

State of Idaho
Supreme Court

(208) 384-2210

February 6, 1979

Ms. Victoria White
Clerk of the District Court
Box 1049
Wallace, ID 83873

Re: Supreme Court No. 12224
State v. Creech

Dear Ms. White:

On February 2, 1979, the Remittitur in the above case issued and forwarded to your office.

As mentioned on the telephone, after discussion with Judge Durtschi it was determined that the Exhibits in this appeal should be returned to Valley County (trial origin) rather than to Shoshone County (appeal origin). This was also the feeling of Judge Towles of your District Court.

We will, therefore, return the Exhibits to Valley County as soon as feasible.

For your information and your file in this appeal we are enclosing herewith a list of the Exhibits.

Sincerely,

R. H. Young
Clerk

RHY:mb
Enclosure:

cc: Judge Durtschi
cc: Counsel of Record
cc: Clerk J. W. Crutcher
Valley County w/list of
Exhibits and copy of
Remittitur

COPY

E X H I B I T S

HEARING ON MOTION TO SUPPRESS, October 3, 1975, Wallace, Idaho.

STATE'S EXHIBIT NO.

MARKED OFFERED ADMITTED

✓ 1. Poem. 738 739 739

✓ 2. Notification of Rights form. 770 774 774

DEFENDANT'S EXHIBIT NO.

✓ A. Handwriting Exemplar of Thomas Eugene Creech. 718 837 838

✓ B. ^(Also State's 501) Purported Statement of Creech dated November 8, 1974. 720 837 838

✓ C. ^(Det. Hill) Officer William Hill's report. 837 838 838

✓ D. Detective Jack Freeman's report. 837 838 838

VOIR DIRE EXAMINATION, Wallace, Idaho, October 6, 1975.

DEFENDANT'S EXHIBIT NO.

✓ E. North Idaho Press, October 3, 1975. 870 871 871

WALLACE, IDAHO, TRIAL EXHIBITS (* indicates previously marked)

STATE'S EXHIBIT NO.

✓ 1-A Photograph * 1610 1610

✓ 1-B Photograph * 1611 1612

✓ 1-C Photograph * 1608 1608

✓ 1-G Photograph * 1609 1609

✓ 1-J Photograph * 1607 1607

1 I N D E X (Continued)

3	<u>STATE'S EXHIBIT NO. (Continued)</u>	<u>Marked</u>	<u>Offered</u>	<u>Admitted</u>
4	✓1-L Photograph	*	1636	1636
5	✓1-M Photograph	*	1637	1637
6	✓3. Diagram of scene.	1715	1716	1716
7	✓3-A Large diagram of scene.	1631	1632	1632
8	✓4. Sleeping bag.	*	1614	1614
9	✓5. Blanket.	*	1615	1615
10	✓6. Piece of asphalt.	*	1642	-
11	✓7. Dome light fragments.	*	1661	1661
12	✓10. (Q-4) Bullet.	*	2119	2120
13	✓11. (Q-1) Bullet.	*	2119	2120
14	✓12. (Q-2) Bullet.	*	2119	2120
15	✓13. (Q-3) Bullet.	*	2119	2120
16	✓17. Portion of investigative file.	*	1722	-
17	✓18. Portion of investigative file.	*	1722	-
18	✓22. (K-1) .22 caliber automatic pistol.	*	2120	2120
19	✓23. Holster.	*	2120	2120
20	✓24. ((Q-17) Blue maxi coat.	*	2121	2121
21	✓25. Purse and contents.	*	2121	2121
22	✓25-A .22 caliber rifle shells.	*	2121	2121
23	✓26. .22 caliber rifle shells.	*	2122	2122
24	✓27. Papers found in 1956 Buick.	*	1647	1647
25	✓27-A Letter, Wayne to Jovce.	*	1698	1698

1 I N D E X (Continued)

2

3 STATE'S EXHIBIT NO. (Continued)

Marked Offered Admitted

4	✓28-A	Photograph	*	-	1645
5	✓28-B	Photograph	*	1657	1657
6	✓28-C	Photograph	*	1657	1657
7	✓28-D	Photograph	*	1657	1657
8	✓28-E	Photograph	*	1657	1657
9	✓28-F	Photograph	*	1657	1657
10	✓28-G	Photograph	*	1655	1656
11	✓29-A	Photograph	*	1654	1654
12	✓29-B	Photograph	*	1654	1654
13	✓29-C	Photograph	*	1654	1654
14	✓29-D	Photograph	*	1654	1654
15	✓30.	Dome light.	*	1661	1661
16	✓41.	(Q-7 through Q-16) envelope containing ten .22 shells.	*	2122	2122
17	✓42.	Photograph	1658	1736	-
18				2122	-
19	✓43.	Photograph.	1658	1736	-
20				2122	-
21	✓44.	Photograph.	1658	1736	-
22				2122	-
23	✓45.	Photograph.	1658	1736	-
24				2122	-
25	✓46.	(Q-5) .22 caliber shell casing.	1658	2122	2122
	47.	Bag containing numerous items. Trial Exhibit Nos. 32-40, Q-25 - Q-33 (Q-17 - Q-49 stipulated as part of Exhibit 47 on Page 2125)	1674	1674 2133	1674 2133

1 I N D E X (Continued)

2

3	STATE'S EXHIBIT NO. (Continued)	Marked	Offered	Admitted
4	✓ 48. (Q-6) .22 caliber shell casing.	1694	2124	2124
5	✓ 49. Entire tape recorded conversation,			
6	Palmer-Creech.	1712	2855 2970	1713 - 2971
7				
8	✓ 49-A Excerpt of tape recording.	2956	2956	2960
9	✓ 50. Copy of notes of Hodge.	1782	1782	1782
10	✓ 51. Blood sample.	1834	1834	1834
11	✓ 52. Blood sample.	1834	1834	1834
12	✓ 53. Dark brown shiny, solid material.	1899	1899	1900
13	✓ 53-A Evidence envelope.	1904	1903	1904
14	✓ 54. Piece of cardboard.	1900	1902	1902
15	✓ 54-A Evidence envelope.	1904	1903	1904
16	✓ 55. Notification of Rights & Waiver.	1945	2096 2562	2097 2563
17	✓ 56. Creech Voluntary Statement.			
18	November 8, 1974.	1945	2103 2562	2105 2563
19	✓ 57. Notification of Rights, Turner.	2002	2003	2003
20	✓ 58. Inventory of Detective Freeman.	2024	2024	2024
21	✓ 59. Copy of Miranda Warning.	2114	2116	2116
22	✓ 60. Copy of FBI report.	2124	2124	2124
23	✓ 61. Letter, Creech-Palmer, 6-9-75.	2197	2199	2199 2290
24				
25	✓ 62. Envelope.	2198	2199	2199 2290

1 I N D E X (Continued)

2

3	<u>STATE'S EXHIBIT NO. (Continued)</u>	<u>Marked</u>	<u>Offered</u>	<u>Admitted</u>
4	63. Edited tape.	2277	2277	2278
5	64. Tape recorder.	2277	2277	2278
6	✓ 65. Handwritten statement of Creech.	2601	2601	2602
7	✓ 66. Photograph.	2617	2618	2618
8	✓ 67. Photocopy of letter, Creech-Plowman.	2620	2621	2621
9	✓ 68. Poem.	2643	2644	2644
10	✓ 69. Letter, Creech-Hilby.	2645	2645	2645
11	✓ 70. Dr. Estess' report (Submitted by Court).	2895	2895	2895

13 FBI LABORATORY "Q" EXHIBITS:

- 14 ✓ Q-17 Maxi coat - Spaulding
- 15 Q-18 Trousers - Spaulding
- 16 Q-19 Sock - Spaulding
- 17 Q-20 Sock - Spaulding
- 18 Q-21 Blouse - Spaulding
- 19 Q-22 Pants - Spaulding
- 20 Q-23 Shoe - Spaulding
- 21 ✓ Q-24 Shoe - Spaulding
- 22 Q-25 Trousers - Creech
- 23 Q-26 Shoe - Creech
- 24 Q-27 Shoe - Creech
- 25 Q-28 Shirt - Creech

1 I N D E X (Continued)

2

3 FBI LABORATORY "Q" EXHIBITS:

4 Q-29 Belt - Creech

5 Q-30 Levi jacket - Creech

6 Q-31 Nylon jacket - Creech

7 Q-32 Sock

8 Q-33 Sock

9 Q-34 Trousers

10 Q-35 Shirt

11 Q-36 Shirt - Bradford

12 Q-37 Trousers - Bradford

13 Q-37A Handkerchief - Bradford

14 Q-38 Undershorts - Bradford

15 Q-39 Sock - Bradford

16 Q-40 Sock - Bradford

17 Q-41 Belt - Bradford

18 Q-42 Shirt - Arnold

19 Q-43 Trousers - Arnold

20 Q-44 Undershirt - Arnold

21 Q-45 Undershorts - Arnold

22 Q-46 Sock - Arnold

23 Q-47 Sock - Arnold

24 Q-48 Shoe - Arnold

25 Q-49 Shoe - Arnold

1

2

3

4

In the Supreme Court of the State of Idaho

STATE OF IDAHO,)	
)	
Plaintiff, Respondent)	
and Cross-Appellant,)	
)	
v.	)	NO. 12224
)	
THOMAS EUGENE CREECH,	)	REMITTITUR
)	
Defendant, Appellant)	
and Cross-Respondent.)	

The Court, by per curiam opinion, on reargument on rehearing, announced the decision in this cause January 11, 1979, to the effect that the judgment of conviction of the District Court of the First Judicial District of the State of Idaho, Shoshone County, is affirmed; sentence is set aside and the case is remanded for further proceedings consistent with the opinion in Lindquist.

IT IS NOW THEREFORE SO ORDERED.

I, R. H. Young, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the attached and foregoing is a true and correct copy of the opinion filed in the above entitled cause February 2, 1979, and now of record in my office.

WITNESS My hand and the seal of this Court February 2, 1979.



Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12224

STATE OF IDAHO,)
)
Plaintiff-Respondent) Coeur d'Alene, May Term, 1977
and Cross-Appellant,)
v.) Filed: JAN 11 1979
)
THOMAS EUGENE CREECH,) R. H. Young, Clerk
)
Defendant-Appellant) THE PREVIOUS OPINION IS
and Cross-Respondent.) WITHDRAWN AND THIS OPINION
) IS HEREBY SUBSTITUTED THEREFOR

Appeal from the District Court of the First Judicial
District of the State of Idaho, Shoshone County. Hon. J.
Ray Durtschi, District Judge.

Appeal from conviction of first degree murder and
sentence of death. Conviction affirmed, but sentence set aside
and case remanded for additional procedure and resentencing.

Bruce O. Robinson, Nampa, for appellant.

Wayne L. Kidwell, Attorney General, and Lynn E. Thomas,
Deputy Attorney General, Boise, for respondent.

PER CURIAM.

Defendant-appellant Thomas Eugene Creech was convicted
of two counts of murder in the first degree and was sentenced
to death. He appeals alleging that his conviction and
sentence must be set aside because (1) Idaho's mandatory
death penalty is unconstitutional; (2) the trial court
refused to permit him to waive his right to a jury trial;
and (3) the trial court improperly dismissed jurors for
cause. We affirm appellant's judgment of conviction, but
set aside his sentence and remand the case for resentencing.

The trial court sentenced appellant pursuant to a
statute which made death the mandatory penalty for first
degree murder. Ch. 276, § 2, 1973 Idaho Sess. Laws 588.

Subsequent to appellant's sentencing, the United States Supreme Court decided *Woodson v. North Carolina*, 428 U.S. 280 (1976), which held unconstitutional such mandatory death penalties. The statute under which appellant was sentenced is virtually identical to the North Carolina statute held unconstitutional in *Woodson*. As to Creech's assignment of error concerning the death penalty, for the reasons expressed in the companion case of *State of Idaho v. Phillip Lewis Lindquist*, No. 12218, released today, the judgment of conviction of the defendant-appellant Creech is affirmed, but the sentence of death imposed by the trial court is set aside and the cause remanded to the district court for resentencing.

Appellant contends that his conviction must be reversed because the trial court refused to permit him to waive his right to a jury trial. The Federal Constitution does not guarantee to a criminal defendant the right to waive a jury trial. *Serfass v. United States*, 420 U.S. 377 (1975); *Singer v. United States*, 380 U.S. 24 (1965). Likewise, the Idaho Constitution does not guarantee the right to waive a jury trial in a felony case. Idaho Const. Art. 1, § 7. Thus, the trial court did not err in refusing to try appellant without a jury.

Finally, appellant argues that his conviction must be set aside because the trial court improperly dismissed two jurors for cause. The jurors were dismissed during voir dire after they stated unequivocally that due to their feelings about the death penalty, they would not vote to find appellant guilty of first degree murder no matter what the evidence showed. Relying upon *Witherspoon v. Illinois*, 391 U.S. 510 (1968), appellant argues that the exclusion of jurors opposed

to capital punishment resulted in a jury so organized as to increase the possibility of his conviction of the crime of first degree murder. The Supreme Court in Witherspoon, however, specifically rejected appellant's argument. It stated, "We simply cannot conclude either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." 391 U.S. at 517-18. Accord, People v. Murphy, 503 P.2d 594 (Cal. 1972). Furthermore, the two jurors who were excluded in this case stated that their feelings about capital punishment would prevent them from voting to convict. The Supreme Court expressly stated that the issue in Witherspoon "does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt." 391 U.S. at 513. Thus, we find no error in the trial court's dismissal of the two jurors in this case.

The issues raised in the cross-appeal filed by the state will not be discussed in this opinion. The state's brief indicates that these issues can be abandoned if the validity of the conviction is upheld and not challenged because of trial conduct. Considering our disposition of the case, we find it unnecessary to address the points raised in the cross-appeal.

The appellant's judgment of conviction is affirmed. His sentence is set aside and the case is remanded for further proceedings consistent with the opinion in Lindquist.

Justice Donaldson and Chief Justice Shepard adhere to their views expressed in State v. Lindquist.

ORIGINAL

MAR 7 1978

Thomas E. Creech -14984
P. O. Box 7309
Boise, Idaho 83707

February 28, 1978

CHIEF JUSTICE - IDAHO SUPREME COURT
c/o Mr. R. H. Young, Clerk
451 W. State Street
Boise, Idaho 83720

Supreme Court No. 12224

Dear Sir,

I'm writing to you in regards to my situation here at the Idaho State Prison, since the Supreme Court handed down their decision on my case S. Ct. No. 12224 on October 20, 1977.

At that time my death sentence was vacated and I was remanded back to the custody of the trial court for resentencing. It is my understanding that I was to be taken back to the county jail, and held there pending further proceedings. I have talked to the Warden here; R. L. Anderson, and he told me before he could transfer me back to Ada County, he would have to receive a court order from you to do so.

I am under no sentence at this time, and I was informed if I wanted I could file a Petition for Writ of Habeas Corpus or write to you to be moved to Ada Co., as it is in violation of my rights to be held in the State Prison under no sentence. Since I was taken off death row I have been classified Maximum Custody, because they say I'm a high escape risk. I have also been subjected to mental harrassment and punishment at this institution. I have no escape record and I feel the Classification Committee's decision on my case was biased because of my charges. I therefore request an injunction to have me removed from Maximum Security isolation and placed in the population of this prison, or, transferred back to Ada County jail to await further proceedings in my appeal.

Thank you for your time and consideration in this matter.

Respectfully yours,

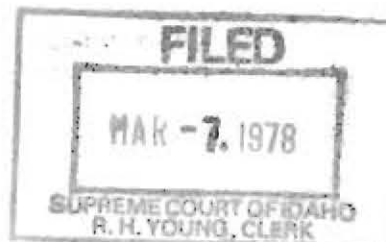
Thomas E. Creech.

Thomas E. Creech

TEC/pll

CC: Bruce O. Robinson
R. L. Anderson-Warden

file



M E M O R A N D U M

February 28, 1978

TO: R.L. ANDERSON, Warden and Members of the I.S.C.I. Classification Committee.

FROM: Thomas E. Creech - 14984

Dear Sirs,

Each time I come before the Classification Committee I always get the same response from the members. When I first got off death row, the Committee said the reason for keeping me in Max. was because they felt I was a high security risk! While I can understand the Committee's thinking that way, I can't see where it is justified. For one thing I have no escapes on my record and I have never been a security problem since I've been here. Also how the Committee can call me a high security risk while at the same time allow other inmates out in general population who have both escaped from this institution repeatedly and have been convicted of equally serious crimes as mine, is not only completely irrational and ambiguous but is blatantly discriminatory!!!!

I would like to be placed in Closed Custody and put into the main population and at least be given a chance to prove I can be a model inmate. I have no reason to escape and if it means anything I would give my word that I would not even attempt an escape. I'm doing a life sentence and I would like to get into some of the programs here and maybe someday I could make parole. If I can't get some kind of help at this institution I would like to be transferred to Ohio, where I am originally from. They have a detainer on me for a parole violation. I would appreciate any consideration you can give me in this matter. I am also enclosing a copy of a letter I have sent to Chief Justice McFadden of the Idaho Supreme Court requesting relief in regards to this matter.

Thank you for your time and consideration.

Respectfully yours,

Thomas E. Creech

Thomas E. Creech 14984

TBC/pll

CC: Bruce O. Robinson, Nampa, Idaho

Chief Justice McFadden, Boise, Idaho

File

ORIGINAL

JAN 25 1978

WAYNE L. KIDWELL
ATTORNEY GENERAL
State of Idaho
Statehouse, Boise, Idaho 83720
Telephone: 384-2400

LYNN E. THOMAS
Deputy Attorney General
State of Idaho

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,	)	Supreme Court No. 12224
)	
V.	)	<u>MOTION FOR EXTENSION OF TIME FOR</u>
	)	<u>FILING RESPONDENT'S BRIEF IN</u>
THOMAS EUGENE CREECH,	)	<u>OPPOSITION TO PETITION FOR REHEARING</u>
)	
Defendant-Appellant.)	

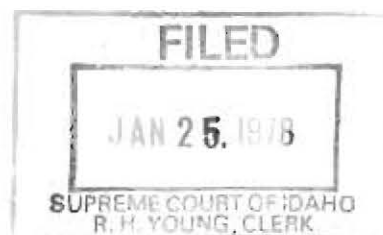
COMES NOW RESPONDENT, The State of Idaho, by and through the undersigned attorney and moves this Court for an order extending the time in which the Respondent's Brief in Opposition to Petition for Rehearing will be due until February 24, 1978.

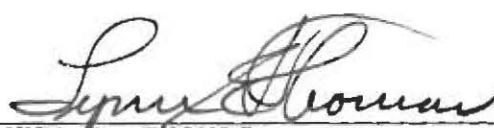
The above motion is based upon the Affidavit of the undersigned attorney. Said Affidavit is attached hereto and incorporated by reference herein.

DATED This 25th day of January, 1978.

Respectfully submitted,

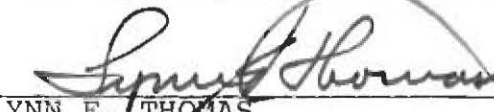
WAYNE L. KIDWELL
ATTORNEY GENERAL




LYNN E. THOMAS
Deputy Attorney General
State of Idaho

CERTIFICATE OF MAILING

I HEREBY CERTIFY That I have this 25th day of January, 1978, served a true and correct copy of the above MOTION FOR EXTENSION OF TIME FOR FILING RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING and AFFIDAVIT, by placing a copy in the United States mail, postage prepaid, and addressed to Mr. Bruce O. Robinson, Attorney at Law, P.O. Box 8, Nampa, Idaho 83651, counsel for Appellant.


LYNN E. THOMAS
Deputy Attorney General

AFFIDAVIT

STATE OF IDAHO)
) ss.
County of Ada)

LYNN E. THOMAS, being first duly sworn upon his oath,
deposes and says:

(1) The date on which the brief of the State of Idaho
is due is January 25, 1978;

(2) No extensions of time have previously been granted,
the original due date of the State's brief having been January
25, 1978;

(3) No previous requests for extensions of time have
been denied or denied in part;

(4) An extension of time is necessary inasmuch as the
State of Idaho, owing to the large volume of criminal appeals,
has been unable to process all criminal briefs within the
established time limits and would be unable to adequately
research the present case if an extension of time were not
granted. In addition, new material was submitted on January
23, 1978, by Bruce O. Robinson, Appellant's counsel;

(5) The State deems necessary an extension of 30 days,
whereupon the State's brief would become due February 24, 1978;

(6) The parties have not stipulated that the proposed
extension be granted;

(8) The opposing party did not verbally express agreement
respecting the present extension of time;

(8) The State will endeavor to file its brief within
the extended time, subject to influences not within the
State's control.


LYNN E. THOMAS

SUBSCRIBED AND SWORN to before me this 25th day of January,
1978.


NOTARY PUBLIC for Idaho
Residing at Boise

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
Plaintiff-Respondent,) Supreme Court No. 12224
)
v.) ORDER
)
THOMAS EUGENE CREECH,)
)
Defendant-Appellant.)
_____)

The Respondent herein, by and through its attorney of record, having filed a Motion for Extension of Time For Filing Respondent's Brief In Opposition To Petition For Rehearing;

Based upon said motion, and good cause appearing,

IT IS HEREBY ORDERED AND THIS DOES ORDER that Respondent's Motion for Extension of Time For Filing Respondent's Brief In Opposition To Petition For Rehearing is GRANTED, and Respondent will have 25 days in which to file its brief on or before the 24th day of February, 1978.

DATED this 30th day of January, 1978.

R. H. Young
CLERK

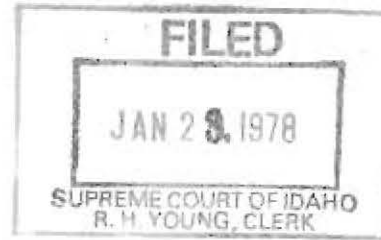
ORIGINAL

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * *

THE STATE OF IDAHO,)
)
 Plaintiff-Respondent)
 and Cross-Appellant,)
)
 vs.)
)
 THOMAS EUGENE CREECH,)
)
 Defendant-Appellant)
 and Cross-Respondent.)

No. 12224



AFFIDAVIT IN SUPPORT OF AMENDMENT OF DEFENDANT-
APPELLANT'S MEMORANDUM IN SUPPORT OF PETITION
FOR REHEARING

Appeal from the District Court of the First Judicial
District of the State of Idaho, in and for the
County of Shoshone

HONORABLE J. RAY DURTSCHI, District Judge

ROBERT REMAKLUS
Prosecuting Attorney
Valley County Courthouse
Cascade, Idaho 83611

WAYNE L. KIDWELL
Attorney General
Room 225, Statehouse
Boise, Idaho 83720

Attorneys for Plaintiff-Respondent
and Cross-Appellant

BRUCE O. ROBINSON
BRUCE O. ROBINSON, P. A.
P. O. Box 8
Nampa, Idaho 83651

Attorney for Defendant-
Appellant and Cross-
Respondent

BRUCE O. ROBINSON, P.A.
ATTORNEYS AT LAW - P.O. BOX 8 - NAMPA, IDAHO 83651

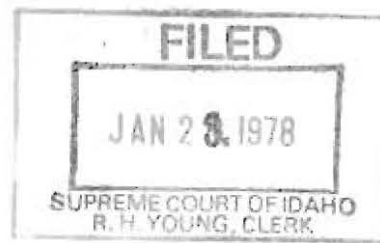
ORIGINAL

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * *

THE STATE OF IDAHO,)
)
Plaintiff-Respondent)
and Cross-Appellant,)
)
vs.)
)
THOMAS EUGENE CREECH,)
)
Defendant-Appellant)
and Cross-Respondent.)
)

No. 12224



AFFIDAVIT IN SUPPORT OF AMENDMENT OF DEFENDANT-
APPELLANT'S MEMORANDUM IN SUPPORT OF PETITION
FOR REHEARING

Appeal from the District Court of the First Judicial
District of the State of Idaho, in and for the
County of Shoshone

HONORABLE J. RAY DURTSCHI, District Judge

ROBERT REMAKLUS
Prosecuting Attorney
Valley County Courthouse
Cascade, Idaho 83611

WAYNE L. KIDWELL
Attorney General
Room 225, Statehouse
Boise, Idaho 83720

Attorneys for Plaintiff-Respondent
and Cross-Appellant

BRUCE O. ROBINSON
BRUCE O. ROBINSON, P. A.
P. O. Box 8
Nampa, Idaho 83651

Attorney for Defendant-
Appellant and Cross-
Respondent

BRUCE O. ROBINSON, P.A.
ATTORNEYS AT LAW - P.O. BOX 8 - NAMPA, IDAHO 83651

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * *

THE STATE OF IDAHO,)
)
Plaintiff-Respondent)
and Cross-Appellant,)
)
vs.) No. 12224
)
THOMAS EUGENE CREECH,)
)
Defendant-Appellant)
and Cross-Respondent.)
)

AFFIDAVIT IN SUPPORT OF AMENDMENT OF DEFENDANT-
APPELLANT'S MEMORANDUM IN SUPPORT OF PETITION
FOR REHEARING

STATE OF IDAHO)
) ss.
County of Canyon)

BRUCE O. ROBINSON, after being first duly sworn, deposes
and says:


That he is the attorney for the defendant-appellant and
cross-respondent in the above entitled matter.

That due to the number of citations and the short period
of time within which to file the Defendant-Appellant's Memorandum
in Support of Petition for Rehearing, typographical errors were
made on lines 3, 4 and 5 of page 3 of said memorandum. That this
error occurred during preparation of the document and was not
noted until after the document had been filed with the court.


Bruce O. Robinson

SUBSCRIBED AND SWORN to before me this 20th day of
January, 1978.

(SEAL)


Notary Public for Idaho
Residence: Nampa, Idaho

CERTIFICATE OF MAILING

I hereby certify that I did on the 20th day of January, 1978, serve a copy of the within and foregoing AFFIDAVIT IN SUPPORT OF AMENDMENT OF DEFENDANT-APPELLANT'S MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING in the above entitled action upon the following:

ROBERT REMAKLUS
Prosecuting Attorney
Valley County Courthouse
Cascade, Idaho 83611

WAYNE L. KIDWELL
Attorney General
Room 225, Statehouse
Boise, Idaho 83720

HONORABLE J. RAY DURTSCHI
District Judge
Ada County Courthouse
Boise, Idaho 83702

by depositing a copy of the same in the United States mail, by certified mail, postage prepaid, in an envelope addressed to each of the above named persons at their addresses as the same are known to me.

BRUCE O. ROBINSON, P. A.

By


Bruce O. Robinson

BRUCE O. ROBINSON, P.A.
ATTORNEYS AT LAW - P.O. BOX 8 - NAMPA, IDAHO 83651

ORIGINAL

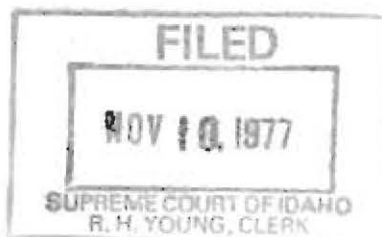
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IN THE SUPREME COURT OF THE STATE OF IDAHO

* * *

STATE OF IDAHO,)	No. 12224
)	
Plaintiff-Respondent)	PETITION FOR
and Cross-Appellant,)	
	)	REHEARING
-vs-)	
)	
THOMAS EUGENE CREECH,)	
)	
Defendant-Appellant)	
and Cross-Respondent.)	



TO: THE SUPREME COURT OF THE STATE OF IDAHO.

COMES NOW Petitioner, THOMAS EUGENE CREECH, Defendant-Appellant and Cross-Respondent herein, and respectfully petitions that the opinion and order of the Supreme Court of the State of Idaho herein, dated October 20, 1977, be set aside and vacated, and that an order granting a rehearing of the appeal in the above-entitled cause be issued, and in support of this petition represents to the Court as follows:

We reserve our argued position as to each of the points of appeal, but in this petition address ourselves to the unconstitutional and ex post facto application of the present Idaho murder statutes to the Petitioner, therefore, the Court was in error in holding that the death penalty could be applied.


The Petitioner will file, within the time period prescribed by Rule 42 of the Supreme Court Rules, brief and memorandum containing necessary authority and arguments.

For the foregoing reasons this Petition for Rehearing

should be granted.

DATED This 9th day of November, 1977.

BRUCE O. ROBINSON, P.A.

By 
Bruce O. Robinson
Counsel for Defendant-Appellant
and Cross-Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of November, 1977,
I mailed true and correct copies of the foregoing instrument
to the following persons, postage prepaid:

The Honorable J. Ray Durtschi
District Judge
Ada County Courthouse
Boise, Idaho 83700

Robert Remaklus
Prosecuting Attorney
Valley County Courthouse
Cascade, Idaho 83611

Wayne L. Kidwell
Attorney General
Room 225, Statehouse
Boise, Idaho 83720


Bruce O. Robinson

BRUCE O. ROBINSON, P.A.
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IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12224

STATE OF IDAHO,)	
Plaintiff-Respondent)	Coeur d'Alene, May Term, 1977
and Cross-Appellant,)	
v.	)	Filed: OCT 20 1977
THOMAS EUGENE CREECH,	)	R. H. Young, Clerk
Defendant-Appellant)	
and Cross-Respondent.	)	Clerk White, Box 1049, BW Wallace, Id 83873

Appeal from the District Court of the First Judicial
District of the State of Idaho, Shoshone County. Hon. J.
Ray Durtschi, District Judge.

Ada County Courthouse Mail BW
Appeal from conviction of first degree murder and
sentence of death. Conviction affirmed, but sentence vacated
and case remanded for additional procedure and resentencing.

Bruce O. Robinson, of Robinson & Jones, Nampa, for
appellant. Box 8, Nampa, Id 83651 BW

Wayne L. Kidwell, Attorney General, and Lynn E. Thomas,
Deputy Attorney General, Boise, for respondent.

DONALDSON, J. State house mail BW

Defendant-appellant Thomas Eugene Creech was convicted
of two counts of murder in the first degree and was sentenced
to death. He appeals alleging that his conviction and
sentence must be set aside because (1) Idaho's mandatory
death penalty is unconstitutional; (2) the trial court
refused to permit him to waive his right to a jury trial;
and (3) the trial court improperly dismissed jurors for
cause. We affirm appellant's judgment of conviction, but
vacate his sentence and remand the case for resentencing.

The trial court sentenced appellant pursuant to a
statute which made death the mandatory penalty for first
degree murder. Ch. 276, § 2, 1973 Idaho Sess. Laws 588.

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12224

STATE OF IDAHO,)	
)	
Plaintiff-Respondent	)	Coeur d'Alene, May Term, 1977
and Cross-Appellant,)	
v.	)	Filed: OCT 20 1977
)	
THOMAS EUGENE CREECH,	)	R. H. Young, Clerk
)	
Defendant-Appellant)	
and Cross-Respondent.)	

Appeal from the District Court of the First Judicial District of the State of Idaho, Shoshone County. Hon. J. Ray Durtschi, District Judge.

Appeal from conviction of first degree murder and sentence of death. Conviction affirmed, but sentence vacated and case remanded for additional procedure and resentencing.

Bruce O. Robinson, of Robinson & Jones, Nampa, for appellant.

Wayne L. Kidwell, Attorney General, and Lynn E. Thomas, Deputy Attorney General, Boise, for respondent.

DONALDSON, J.

Defendant-appellant Thomas Eugene Creech was convicted of two counts of murder in the first degree and was sentenced to death. He appeals alleging that his conviction and sentence must be set aside because (1) Idaho's mandatory death penalty is unconstitutional; (2) the trial court refused to permit him to waive his right to a jury trial; and (3) the trial court improperly dismissed jurors for cause. We affirm appellant's judgment of conviction, but vacate his sentence and remand the case for resentencing.

The trial court sentenced appellant pursuant to a statute which made death the mandatory penalty for first degree murder. Ch. 276, § 2, 1973 Idaho Sess. Laws 588.

Subsequent to appellant's sentencing, the United States Supreme Court decided *Woodson v. North Carolina*, 428 U.S. 280 (1976), which held unconstitutional such mandatory death penalties. The statute under which appellant was sentenced is virtually identical to the North Carolina statute held unconstitutional in *Woodson*. There can be no doubt, therefore, that we must set aside appellant's sentence of death.

Setting aside appellant's sentence, of course, does not invalidate I.C. § 18-4003 (amended 1977) which defines the offense of murder, nor does it invalidate appellant's conviction. He still stands convicted of first degree murder. In the past when we have set aside a sentence while affirming the underlying conviction, we have remanded the case for resentencing. *State v. Wallace*, ___ Idaho ___, 563 P.2d 42 (1977); *State v. Brown*, 98 Idaho 209, 560 P.2d 880 (1977); *State v. Gowin*, 97 Idaho 146, 540 P.2d 808 (1975); *State v. French*, 95 Idaho 853, 522 P.2d 61 (1974); *State v. Gish*, 87 Idaho 341, 393 P.2d 342 (1964); *State v. Freeman*, 85 Idaho 339, 379 P.2d 632 (1963). Appellant contends, however, that he cannot be resentenced. He argues that with the mandatory death penalty invalidated, there is now no punishment for first degree murder. We disagree.

Prior to 1973, the punishment for murder was as follows: "Every person guilty of murder in the first degree shall suffer death or be punished by imprisonment in the state prison for life." Ch. 68, § 1, 1911 Idaho Sess. Laws 190 (repealed 1971, reenacted 1972)(codified as I.C. § 18-4004). Following the decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the Idaho Legislature amended the statute by deleting therefrom the provision for life imprisonment. Ch. 276, § 2, 1973 Idaho Sess. Laws 588 (amended 1977). Since the amendment is unconstitutional, however, it is void and ineffective for any purpose. There is nothing to indicate that the Legislature would have refused to retain the prior penalty statute

without the 1973 amendment. Thus, the former statute remains in effect as if the amendment had never been attempted. *American Independent Party in Idaho, Inc. v. Cenarrusa*, 92 Idaho 356, 442 P.2d 766 (1968); *Berry v. Summers*, 76 Idaho 446, 283 P.2d 1093 (1955); 16 Am.Jur.2d, Constitutional Law § 177 (1964).

The question remains whether resentencing appellant under the former statute would violate the eighth amendment to the Constitution.¹ The eighth amendment imposes both substantive and procedural restrictions on the imposition of the death penalty.² The substantive restrictions concern whether the death penalty is barbaric or excessive in relation to the crime committed. It is now well settled that imposing the death penalty for the crime of first degree murder is neither inherently barbaric nor an unacceptable mode of punishment; neither is it always disproportionate to the crime. *Coker v. Georgia*, 45 U.S.L.W. 4961 (U.S. June 29, 1977); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976). The procedural limits are designed to ensure that the death penalty is not arbitrarily and capriciously imposed. It was the lack of adequate procedural safeguards which prompted the Supreme Court to hold unconstitutional the death penalty in *Furman v. Georgia*, *supra*; *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, *supra*; and

1 The eighth amendment's proscription of cruel and unusual punishment is applicable to the states through the fourteenth amendment. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

2 In *Gregg v. Georgia*, 428 U.S. 153, 172 (1976), the Court stated:

"The substantive limits imposed by the Eighth Amendment on what can be made criminal and punished were discussed in *Robinson v. California*, 370 U.S. 660 (1962). * * * Most recently, in *Furman v. Georgia*, *supra*, three Justices in separate concurring opinions found the Eighth Amendment applicable to procedures employed to select convicted defendants for the sentence of death."

See *Coker v. Georgia*, 45 U.S.L.W. 4961 (U.S. June 29, 1977), where the Court distinguished between the substantive and procedural restrictions on the death penalty.

Roberts v. Louisiana, 45 U.S.L.W. 4584 (U.S. June 6, 1977).

As the Court stated in Woodson, "the issue, like that explored in Furman, involves the procedure employed by the State to select persons for the unique and irreversible penalty of death." 428 U.S. at 287.

The sentencing procedures mandated by the Supreme Court in the recent death penalty cases are as follows: (1) there must be a hearing to consider the aggravating and mitigating circumstances surrounding the defendant's crime; (2) there must be standards to guide the sentencing authority in its election of which first degree murderer shall live and which shall die; and (3) there must be meaningful appellate review to guard against the arbitrary and capricious exercise of the sentencing power.³ We will consider these requirements in order.

First, there must be a hearing to consider the aggravating and mitigating circumstances surrounding the defendant's crime. Because of the finality of a sentence of death, there is an increased need for reliability in the determination that death is the appropriate punishment in a specific case. Consequently, the eighth amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, supra at 304.

On remand, the trial court can order a hearing to

³ Although the right to appellate review is not guaranteed by due process, United States v. MacCollom, 96 S.Ct. 2086 (1976); Griffin v. Illinois, 351 U.S. 12 (1956), the Supreme Court has strongly indicated that the eighth amendment requires appellate review of death sentences as a safeguard against arbitrariness and caprice. Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

consider the aggravating and mitigating circumstances surrounding appellant's crime. I.C. §§ 19-2515 (1948)(amended 1977) and 19-2516; State v. Arnold, 39 Idaho 589, 229 P. 748 (1924). At the hearing appellant can introduce all relevant evidence tending to mitigate the character of his conduct, including evidence of his background, age, upbringing, and environment. State v. Clokey, 83 Idaho 322, 364 P.2d 159 (1961). In addition, the court can order a presentence investigation report pursuant to I.C.R. 37. The rule directs the presentence investigator to compile a detailed report of the defendant's life history and of the circumstances surrounding his crime, including his version of what happened.

Second, there must be standards to guide the sentencing authority. This can be accomplished by providing a list of aggravating factors, at least one of which must be found to exist before the defendant can be sentenced to death. The sentencing authority can consider other aggravating factors, however, in deciding whether the aggravating factors outweigh the mitigating ones. Gregg v. Georgia, supra. Furthermore, there need be no guidelines either as to what mitigating factors to consider, Gregg v. Georgia, supra, or as to how to weigh the mitigating and aggravating factors. Proffitt v. Florida, supra.

The statutes in effect at the time appellant committed his murders did not contain a list of aggravating factors to guide and channel sentencing discretion. Idaho Code § 19-2515 was subsequently amended, however, to include such a list. Ch. 154, § 4, 1977 Idaho Sess. Laws 390. On remand the trial court should follow procedures similar to those contained in the amended statute.

Third, as a final safeguard against arbitrariness and caprice, there must be effective judicial review of the sentence by a court with statewide jurisdiction. The

purpose of such review is to compare "each death sentence with the sentence imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." *Gregg v. Georgia*, supra at 198.

If on remand, appellant is again sentenced to death, this Court will be able to conduct an effective review of the sentence. The trial court will have made written findings setting forth the aggravating factors found to exist and the mitigating factors considered. In addition, we will have the record of the sentencing hearing.

The constitutionality of sentencing procedures in capital cases must be considered as they have been construed by the state appellate court. *Proffitt v. Florida*, supra; *Jurek v. Texas*, supra. To ensure that appellant when resented is not arbitrarily and capriciously sentenced to death, we have required the trial court to judge appellant's conduct in light of certain aggravating factors. Although there can be no doubt that we have the power to formulate such procedural rules, *I.C. § 1-212*; *State v. Yoder*, 96 Idaho 651, 534 P.2d 771 (1975); *R.E.W. Construction Co. v. District Court*, 88 Idaho 426, 400 P.2d 390 (1965); *State v. Johnson*, 86 Idaho 51, 383 P.2d 326 (1963), the question remains whether such action would, in effect, operate like an ex post facto law.⁴ In *Dobbert v. Florida*, 45 U.S.L.W. 4721 (U.S. June 17, 1977), the United States Supreme Court answered that question in the negative.

⁴ An ex post facto law is a statute which "punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed." *Beazell v. Ohio*, 269 U.S. 167, 169 (1925). Although the ex post facto clause is a limitation on the power of the state legislatures, the due process clause bars a state supreme court from achieving the same result through judicial construction. *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

The death penalty statute in effect at the time Dobbert murdered two of his children was later declared unconstitutional by the Florida Supreme Court. By the time Dobbert was sentenced, however, a constitutional death penalty statute had been enacted. The United States Supreme Court held that sentencing him to death under the new statute did not violate the ex post facto clause. In so holding, the Supreme Court stressed several factors. First, the changes made by the new statute were clearly procedural. The statute altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime. Second, the procedural changes were ameliorative. The new statute afforded significantly more safeguards to ensure that the death penalty was not arbitrarily and capriciously imposed. Finally, at the time Dobbert murdered his children, there was in effect a statute warning him that the crime of first degree murder could be punished by death. Whether or not the statute would withstand future constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers.

Applying the reasoning in Dobbert to the present case, it is clear that appellant can be resentenced under the procedures we have specified. We have changed only the procedures for determining whether to impose the death penalty; the quantum of punishment and the definition of the crime remain the same. The procedural changes afford appellant significantly greater protection against the arbitrary and capricious imposition of the death penalty. Finally, at the time appellant murdered his two victims, he was on notice that Idaho would seek to punish his acts with death.

Although our disposition of this case would not violate the federal ex post facto clause, we are asked to construe the Idaho ex post facto clause more narrowly. The argument is that under the law in effect at the time appellant murdered his victims, he could not be constitutionally sentenced to death. Thus, it would surely violate the ex post facto clause if he were resentenced to death under procedures we have altered to conform to the requirements of eighth amendment. This simplistic argument mocks the substance of the ex post facto clause, as a few examples will demonstrate. Under this argument, a defendant who did not obtain an impartial jury because the state statutes did not permit the required change of venue, *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961), could not be granted a change of venue so that he could be retried by an impartial jury. An indigent defendant whose conviction was reversed because under state law he was not entitled to appointed counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), could not be given the assistance of appointed counsel in order that he could be retried in conformity with the Constitution. Where a defendant's conviction was reversed because a state law prevented a co-participant in the crime from testifying in the defendant's behalf, *Washington v. Texas*, 388 U.S. 14 (1967), the law could not be changed to permit the co-participant to testify if the defendant were retried. A defendant who was unconstitutionally denied the right to a jury trial under state law, *Duncan v. Louisiana*, 391 U.S. 145 (1965), or who was tried by a jury from which women were unconstitutionally excluded by statute, *Taylor v. Louisiana*, 419 U.S. 522 (1975), could not be retried by a validly selected jury. Finally, where a defendant's conviction was set aside because under state procedures a jury was allowed to determine the voluntariness of his confession, on

remand the procedure for deciding whether the confession was voluntary could not be changed to conform to the Constitution. In all of the above examples, the defendants could not be constitutionally convicted under the laws in effect at the time they committed their crimes. Retrial of the defendants would require a change in existing law. For obvious reasons, the Supreme Court has rejected the argument that the federal ex post facto clause gives a criminal defendant the right to be tried, in all respects, by the law in force when the alleged crime was committed. *Dobbert v. Florida*, supra; *Gibson v. Mississippi*, 162 U.S. 565 (1896). We likewise decline to give that interpretation to the Idaho ex post facto clause.

The underlying basis for the ex post facto clause is a belief that it would be manifestly unjust to punish as criminal an act which was innocent when done. As stated by Justice Paterson in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 396 (1798)(quoting from Judge Blackstone):

"'Here it is impossible, that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilty by a subsequent law; he had, therefore, no cause to abstain from it; and all punishment when not abstaining must of consequence be cruel and unjust.'"

The rationale underlying the clause also prohibits statutes enhancing the punishment for a crime after its commission and statutes depriving a defendant of a defense available at the time he committed his criminal act.

At the time appellant killed his victims, he was on notice that his actions constituted the crime of first degree murder, and that the punishment for that crime could be death. Nothing we do today changes either the definition of the crime or the quantum of punishment attached thereto or the available defenses. We have changed only the sentencing procedures by requiring that the sentencing discretion be

guided and channelled rather than completely unrestrained. The purpose of the change is to provide the procedural protections required by *Furman v. Georgia*, supra, and *Woodson v. North Carolina*, supra, thus providing capital defendants with more, rather than less, judicial protection. We therefore hold that our decision in this case does not deprive appellant of due process of law by operating, in effect, like an ex post facto law.

Appellant next contends that his conviction must be reversed because the trial court refused to permit him to waive his right to a jury trial. The Federal Constitution does not guarantee to a criminal defendant the right to waive a jury trial. *Serfass v. United States*, 420 U.S. 377 (1977); *Singer v. United States*, 380 U.S. 24 (1965). Likewise, the Idaho Constitution does not guarantee the right to waive a jury trial in a felony case. Idaho Const. Art. 1, § 7. Thus, the trial court did not err in refusing to try appellant without a jury.

Finally, appellant argues that his conviction must be set aside because the trial court improperly dismissed two jurors for cause. The jurors were dismissed during voir dire after they stated unequivocally that due to their feelings about the death penalty, they would not vote to find appellant guilty of first degree murder no matter what the evidence showed. Relying upon *Witherspoon v. Illinois*, 391 U.S. 510 (1968), appellant argues that the exclusion of jurors opposed to capital punishment resulted in a jury so organized as to increase the possibility of his conviction of the crime of first degree murder. The Supreme Court in Witherspoon, however, specifically rejected appellant's argument. It stated, "We simply cannot conclude either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to

capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." 391 U.S. at 517-18. Accord, People v. Murphy, 503 P.2d 594 (Cal. 1972). Furthermore, the two jurors who were excluded in this case stated that their feelings about capital punishment would prevent them from voting to convict. The Supreme Court expressly stated that the issue in Witherspoon "does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt." 391 U.S. at 513. Thus, we find no error in the trial court's dismissal of the two jurors in this case.

The issues raised in the cross-appeal filed by the state will not be discussed in this opinion. The state's brief indicates that these issues can be abandoned if the validity of the conviction is upheld and not challenged because of trial conduct. Considering our disposition of the case, we find it unnecessary to address the points raised in the cross-appeal.

The appellant's judgment of conviction is affirmed. His sentence is vacated and the case is remanded for further proceedings consistent with this opinion.

SHEPARD, J., and SCOGGIN, D.J., Retired, concur.

BAKES, J., concurring in part and dissenting in part:

I

I concur in that portion of the majority opinion "affirm[ing] appellant's judgment of conviction, but vacat[ing] his sentence and remand[ing] the case for resentencing." Ante at 1. However, I emphatically disagree that as a "procedural" matter this Court can redraft the death penalty statute, as the majority has done, in order to fit it within the parameters of the most recent notions of the United States Supreme Court regarding constitutionally acceptable death penalty sentencing requirements.

The majority of this Court has found the Idaho death penalty statute, after it was amended by ch. 276, § 2, 1973 Idaho Session Laws, to be unconstitutional because, as amended, it made the death penalty mandatory, and therefore violated the standards contained in *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976). With that much I am in agreement.

However, the majority then concludes:

"Since the amendment is unconstitutional, however, it is void and ineffective for any purpose. There is nothing to indicate that the legislature would have refused to retain the prior penalty statute without the 1973 amendment. Thus, the former statute remains in effect as if the amendment had never been attempted. *American Independent Party in Idaho, Inc., v. Cenarrusa*, 92 Idaho 356, 442 P.2d 766 (1968); *Berry v. Summers*, 76 Idaho 446, 283 P.2d 1093 (1955); 16 Am.Jur.2d, Constitutional Law § 177 (1964)."

The majority fails to acknowledge that the pre-1973 statute was also unconstitutional under *Furman v. Georgia*, 408 U.S. 238 (1972), because while it permitted the court to impose either a life sentence or death, it provided no guidelines to control the sentencing authority in determining who would be given the death penalty and who would be given life imprisonment. Thus, whether the majority looks at the pre-

1973 statute or the post-1973 statute is of little consequence because they were both unconstitutional under the decisions of the United States Supreme Court.

II

One would think that that would effectively put an end to any argument that the death penalty could be constitutionally imposed in this case. However, the majority concludes that even though the Idaho death penalty statute in effect at the time of the commission of the crime was unconstitutional, nevertheless this Court, by its rule-making power, can order that the 1977 amendments to the Idaho Death Penalty Act be applied in this case. Yet the 1977 amendments did not go into effect until March 28, 1977, more than 28 months after the commission of the crime.

The basic fallacy of the Court's reasoning is in equating the "procedural" due process requirements of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, as discussed in the recent United States Supreme Court death penalty cases, with the "procedural" rules which we have held that this Court has authority to make. See State v. Yoder, 96 Idaho 651, 534 P.2d 771 (1975); R.E.W. Const. Co. v. District Court, 88 Idaho 426, 400 P.2d 390 (1965); State v. Johnson, 86 Idaho 51, 383 P.2d 326 (1963). See also I.C. § 1-212. The majority reasons that since the United States Supreme Court has stated that "the issue ... involves the procedure employed by the State to select persons for the unique and irreversible penalty of death ...", ante at 4, it was referring to the same "procedure" which this Court was talking about in State v. Yoder, R.E.W. Construction Co. v. District Court, and State v. Johnson cases, supra. The word "procedural" as used by this Court in the foregoing cases means the procedure by which

the Idaho courts conduct their business, not the substantive law which governs the case. The "procedural" due process requirements of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution are rights guaranteed by the United States Constitution, which neither the Congress, the Idaho legislature, nor this Court can modify or repeal. As far as state action is concerned, they are immutable. When comparing the rule-making authority of this Court regarding the procedure to be followed in conducting litigation in the courts of this state, with the procedural due process rights guaranteed by the United States Constitution, it is obvious that there is a qualitative and quantitative difference. As contrasted with our court rules, the procedural due process rights guaranteed by the United States Constitution are matters of substantive law.

Therefore, when the majority quotes from *Woodson v. North Carolina*, that "'the issue, like that explained in *Furman*, involves the procedure employed by the state to select persons for the unique and irreversible penalty of death,'" ante at 4, and then equates that "procedure" with this Court's rule-making authority, it is engaging in an unjudicious play on words. Thus, the conclusion of the majority that this Court has the power, by rule, to impose a death penalty and to establish the procedure for employing it is a grossly unwarranted expansion of the rule-making authority of this Court.

III

The legislature itself has said that its acts are not to be applied retroactively unless expressly so declared by the legislature. I.C. § 73-101. As for applying the rules of this Court retroactively, rules by their very nature operate prospectively. I have not been able to find any

authority authorizing or permitting the retroactive application of a court rule in a criminal case to the detriment of a defendant. The suggestion by the majority that the appellant will have "significantly greater protection" under the procedure which it has adopted is a grisly misnomer. No death penalty could have constitutionally been imposed under the statutory scheme in force at any of the times that the defendant either committed the act, was tried and found guilty, or was sentenced. Under the procedure now approved by the majority of the Court the defendant will admittedly get more due process, but he will also stand a likely chance of being executed. I am sure the appellant will have a difficult time understanding how he has received "significantly greater protection" as a result of the decision of the Court today.

IV

While the decision of *Dobbert v. Florida*, ___ U.S. ___ 97 S.Ct. 2290 (1977), may represent the present thinking of a majority of the United States Supreme Court on the question of ex post facto application of a criminal statute, the facts of this case are significantly different than in *Dobbert*. In *Dobbert* the amended state statute which passed constitutional muster was enacted after the commission of the act by the defendant, but before trial and sentencing. Here, however, the defendant committed the act, was charged, tried, and convicted and sentenced, all at a time when the Idaho statute imposing the death penalty for first degree murder in Idaho was unconstitutional. It is only on appeal, and then after the case was argued and submitted by the parties, that the decision in the *Dobbert* case was rendered by the United States Supreme Court. The parties in this proceeding did not even have an opportunity to brief and argue the ex post facto question. If this Court is even considering

the result which the majority has reached, basic fairness would seem to indicate that the matter should be reset for hearing so that the parties can brief and argue both the ex post facto issues raised in Dobbert and the retroactive application of the 1977 amendment to the Idaho statute through the so-called rule-making procedure which the majority has employed in order to make the 1977 statute applicable to the facts of this case. Regardless of the Dobbert decision, in my opinion the action taken by the majority of this Court today not only violates both the ex post facto provisions of the Idaho Constitution, Art. 1, § 16, and the United States Constitution, Art. 1, § 9, but also violates I.C. § 73-101, and is an unwarranted and unconstitutional retroactive application of this Court's rule-making authority.

V

I do not agree with the defendant's argument that because the statute under which he was sentenced was unconstitutional he should entirely escape punishment for the crime of which he stands convicted. When the defendant was found guilty of first degree murder, he was necessarily found guilty of the lesser included offense of second degree murder. *State v. Hutter*, 18 N.W.2d 203 (Neb. 1945); see *State v. Arney*, 544 P.2d 334 (Kan. 1975). The punishment for the included offense of second degree murder is "not less than ten years and the imprisonment may extend to life." Accordingly, the sentence of death should be vacated and the cause remanded to the district court for resentencing to any punishment permitted for the conviction of the lesser included offense of second degree murder. Cf. *State v. Jenkins*, 340 So.2d 157 (La. 1976) (state's mandatory death penalty having been declared unconstitutional, court held

appropriate punishment for first degree murder to be most severe penalty established by legislature for criminal homicide at time of offense - penalty prescribed for second degree murder); State v. Craig, 340 So.2d 191 (La. 1976) (upon declaring mandatory death penalty unconstitutional, court held appropriate punishment for aggravated rape to be most serious penalty for next lesser included offense).

BISTLINE, J., concurs.

BISTLINE, J., dissenting.

Like Justice Bakes, I am disturbed by the majority's crucial reliance on Dobbert v. Florida, supra--a United States Supreme Court decision which was handed down six weeks after the parties to the present case had submitted their briefs and concluded their oral arguments before this Court. Since neither party had access to the Dobbert opinion at the time this case was argued, the majority, in effect, is using it to rule against a defendant who has never had the opportunity to argue the application of that case to his own.¹ Without the benefit of full briefing and argument in an adversary context, I do not believe that this Court should blindly hold out Dobbert as the authoritative gloss to be placed upon the ex post facto clause of the Idaho Constitution² and that the decision is not, as its dissenters suggested, merely "an archaic gargoyle" which serves to create a "demeaning construction of a majestic bulwark in the framework of our Constitution." (Stevens, J., dissenting.) Nor would I, without a full adversary presentation, extend Dobbert far

¹ It is important to note that the reasoning employed by the majority in reaching today's result was never argued to the Court. The State argued rather that the Court could judicially construe the death penalty statute in such a way as to make it pass constitutional muster. Failing that, the State argued, in the alternative, that the death penalty statute could be salvaged by declaring that it never was mandatory in nature--because of the doctrine that sentencing procedures are wholly within the judicial authority and cannot be mandatorily imposed

beyond its own fact pattern to a situation which the majority of the United States Supreme Court expressly denied was at issue in that case and which the dissenters saw as the reductio ad absurdum of the doctrine itself. Where a man's life hangs on the strength of the Dobbert opinion, a sound judicial discretion requires that the case be set for a further hearing at which each party can address that opinion both by written brief and oral presentation.

I.

The majority opinion assures us that,

"Nothing we do today changes either the definition of the crime or the quantum of punishment attached thereto. . . . We have changed only the sentencing procedures. . . ."

Justice Bakes, in a dissent which I endorse completely, has unveiled the "grisly misnomer" whereby the majority today equates the "procedural" safeguards guaranteed by the United States Constitution with the "procedural" housekeeping rules which may properly be promulgated by this Court.

The California Supreme Court was recently presented with much the same argument:

"The People argue finally that the defects in the California statutory scheme for imposition of capital punishment can be overcome by judicially mandated procedures, which this court should pronounce because the Legislature intended to write a constitutional death penalty. . . . We decline the People's invitation.

[n. 1]
on courts by the legislature. State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971); REW Const. Co. v. District Court, 88 Idaho 426, 400 P.2d 390 (1965).

At no time did the State argue that this Court had the power to do what it does today, namely, declare the Idaho death penalty statute unconstitutional and still remand for a resentencing in which the death penalty remains a possible outcome.

2 The majority states that, "Although our disposition of this case would not violate the federal ex post facto clause, we are asked to construe the Idaho ex post facto clause more narrowly." Actually, no one has asked us to construe the Idaho ex post facto clause more narrowly than Dobbert's construction of the federal ex post facto clause, for the simple reason that Dobbert did not yet exist when this case was argued.

They ask us not to interpret, but to rewrite the law in a manner which we have shown would be contrary to the manifest legislative intent in enacting a mandatory death penalty statute." Rockwell v. Superior Court of Ventura Co., 134 Cal.Rptr. 650, 665 (1976).

The California Supreme Court refused to prescribe sentencing procedures simply because the procedures involved are most emphatically not just procedural. A state's highest court has no inherent power to rewrite the substantive statutory law. Even if one were to choose among the procedures which have been held valid by the United States Supreme Court, one would, at every step, be making major policy decisions of substantive import--decisions which properly belong to the people, through their legislature:

"Decisions as to which criminal defendants shall suffer the death penalty, whether these decisions shall be made by judge or jury, whether and to what extent a jury determination is reviewable by the trial court and/or the reviewing court, and the scope of responsibility to be given this court to safeguard against arbitrary imposition of the death penalty are matters of legislative concern. Were this court to attempt to devise the necessary procedures and criteria we would not only invade the legislative province, but would also be in the position of having to pass objectively on the constitutionality of procedures of our own design." (Emphasis added.) Ibid.

The Supreme Court of Indiana was recently faced with the same issue. There, the state contended that, under the Indiana Constitution, "in all appeals of criminal cases," the court had the "power to review all questions of law and revise the sentence imposed." IND. CONST. art. 7, § 4. The court held that even this constitutional mandate did not empower it to provide procedures under which the death penalty might be imposed on resentencing. The Indiana court, unlike the California court, reached its decision reluctantly, but with the same acute sense of judicial responsibility:

"Although the writer of this opinion does not agree with the present reasoning of the United States Supreme Court plurality opinion upon the issue here involved, we have taken an oath to support the Constitution as interpreted by that Court." French v. State, 362 N.E.2d 834, 838 (Ind. 1977).

Reluctantly, then, the Indiana Supreme Court concluded that the contentions of the State could not be sustained:

"These contentions suffer on two counts. First, we do not see how this Court or a trial court could review and revise sentences of death in the absence of statutory procedures providing for the introduction of appropriate evidence upon which to base such review. Second, we do not see it as the role of the judiciary to legislate the standards by which the death penalty should be applied. The establishment of such standards, and the procedures by which evidence relevant to those standards and the individual accused would be made a part of court record, are tasks within the realm of the legislative branch." (Emphasis added.)
Ibid.

Regardless of semantics, then, this Court is engaged in a pre-emption of the legislative function when it today prescribes the "procedures" to be used in resentencing--even though the impact of the intrusion is wisely softened by a choice of the same procedures chosen by the 1977 legislature.

II.

The heart of my dissent, however, lies elsewhere. This Court need not, I am convinced, ever reach the question of the ex post facto implications of court-promulgated resentencing procedures. The majority opinion suffers from a still more fundamental error. It is premised upon the supposition that the Idaho death penalty statute can be carved into three parts:

1. The substantive definition of the crime of first degree murder;
2. The quantum of punishment for those guilty of first degree murder, i.e., the death penalty;
3. The sentencing procedures used in imposing the death penalty.

The assertion is then made that the first two components-- namely, Creech's conviction and the quantum of punishment (the death penalty) therefor--survive the Court's determination that the Idaho death penalty statute is unconstitutional in the light of Woodson v. North Carolina, supra. No authority is offered in support of this startling premise. Indeed, none could be found.

Twice in the last five years, state courts have faced the problem of sorting out the implications of United States Supreme Court decisions holding death penalty statutes unconstitutional. As a result, the precise question of what procedures may be followed and what sentences imposed on remand has arisen frequently in our sister states. The case law on the topic has become firmly established:

"This is not the first time that decisions of the United States Supreme Court have invalidated Louisiana provisions relative to capital punishment. In Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed.2d 776 (1968), and again in Furman v. Georgia, supra, Louisiana statutes were effectively invalidated. Each time this Court was called upon to resolve the question of sentencing defendants validly convicted but unconstitutionally sentenced to death. In each case we instructed the trial courts to substitute life imprisonment for the death sentence. [Citations omitted.]" State v. Jenkins, 340 So.2d 157, 179 (La. 1976).

Once the death penalty statute is found unconstitutional, it is clear that the death penalty cannot be reimposed on the convicted criminal. To this effect, in addition to the cases already cited, see: United States v. Johnson, 425 F.Supp. 986 (E.D.La. 1976); Boyd v. Commonwealth, 550 S.W.2d 507 (Ky. 1977); Blackwell v. State, 365 A.2d 545 (Md. 1976); State v. Duren, 547 S.E.2d 476 (Mo. 1976); Smith v. State, 560 P.2d 158 (Nev. 1977); State v. Rondeau, 553 P.2d 688 (N.M. 1976); People v. Velez, 388 N.Y.S.2d 519 (N.Y.Sup.Ct. 1976); State v. Warren, 232 S.E.2d 419 (N.C. 1977); Riggs v. Branch, 554 P.2d 823 (Okla. Crim.App.

1976); State v. Rumsey, 226 S.E.2d 894 (S.C. 1976); Collins v. State, 550 S.W.2d 643 (Tenn. 1977); Kennedy v. State, 559 P.2d 1014 (Wyo. 1977).

Despite this unbroken line of authority, which the majority neither acknowledges nor attempts to distinguish, we are told that today's determination that the Idaho death penalty statute is unconstitutional nonetheless leaves standing the death penalty itself as a possible sentence for imposition on remand. Where, we ask, is the statutory authority for imposing a death penalty--since the majority insists that nothing it does today affects anything but sentencing procedures? The answer is not hard to find. As stated in the majority opinion.

"Following the decision in Furman v. Georgia, 408 U.S. 238 (1972), the Idaho Legislature amended the statute by deleting therefrom the provision for life imprisonment. Ch. 276, sec. 2, 1973 Idaho Sess. Laws 588 (amended (1977)). Since the amendment is unconstitutional, however, it is void and ineffective for any purpose. There is nothing to indicate that the Legislature would have refused to retain the prior penalty statute without the 1973 amendment. Thus, the former statute remains in effect as if the amendment had never been attempted." (Emphasis added.)

But as Justice Bakes demonstrates, "the former statute"--which is today invoked to salvage "the quantum of punishment" (i.e., the death penalty)--was itself clearly unconstitutional as a result of the Furman decision. In Furman, the United States Supreme Court held that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Thus the Court held that the judgment in each case was reversed "insofar as it leaves undisturbed the death sentence imposed" and the cases were remanded for further proceedings. See, Furman v. Georgia, 408 U.S. 238, 240, and accompanying cases, 408 U.S. 932-941 (1972).

It was the clear understanding of each member of the Furman court that the decision there was such as to preclude those sentenced under unconstitutional statutes from being liable to the death penalty upon resentencing. Justice Powell, with the concurrence of the three other dissenters, stated:

"Whatever uncertainties may hereafter surface, several of the consequences of today's decision are unmistakably clear. The decision is plainly one of the greatest importance. The Court's judgment removes the death sentences previously imposed on some 600 persons awaiting punishment in state and federal prisons throughout the country. . . . The happy event for these countable few constitutes, however, only the most visible consequences of this decision. . . . The capital punishment laws of no less than 39 States and the District of Columbia are nullified." 408 U.S. 416-17.

Clearly, then, the impact of Furman was to free those on death row from any possible imposition of the death penalty once the death penalty statutes were ruled unconstitutional. Justice Marshall emphasized this fact:

"Hanging in the balance are not only the lives of three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution."

Justice Blackmun, at the other end of the spectrum, likewise appreciated the magnitude of the Furman decision:

"I trust the Court fully appreciates what it is doing when it decides these cases the way it does today. Not only are the capital punishment laws of 39 States and the District of Columbia struck down, but also all those provisions of the federal statutory structure that permit the death penalty apparently are voided." 408 U.S. at 411.

Yet the majority of the Idaho Supreme Court today tell us that its holding of the post-Furman statute unconstitutional leaves standing the the pre-Furman statute as a valid source of a constitutionally acceptable death penalty!

If any further explication were needed as to what options remain open on remand, the United States Supreme

Court itself provided it on the very day Furman was decided. In Moore v. Illinois, 408 U.S. 786 (June 29, 1972), the Court had before it a case challenging various evidentiary matters. After ruling adversely to the defendant, the Court (through Mr. Justice Blackmun) ruled:

"Inasmuch as the Court today has ruled that the imposition of the death penalty under statutes such as those of Illinois is violative of the Eighth and Fourteenth Amendments, Furman v. Georgia, ante, p. 238, it is unnecessary for us to consider the claim of noncompliance with the Witherspoon standards. In Witherspoon, 391 U.S. at 523 in n. 21, the Court stated specifically 'Nor, finally, does today's holding render invalid the conviction, as opposed to the sentence, in this or any other case' (emphasis in original). The sentence of death, however, may not now be imposed."

"The judgment, insofar as it imposes the death sentence, is reversed, Furman v. Georgia, supra, and the case is remanded for further proceedings. . . ." 408 U.S. at 800.

The same procedure followed in Furman has now been used in the Woodson and Roberts cases. The Court did not vacate the judgment and remand the case for reconsideration. Rather, it stated:

". . . we conclude that the death sentences imposed upon the petitioners under North Carolina's mandatory sentence statute violated the Eighth and Fourteenth Amendments and therefore must be set aside. The judgment of the Supreme Court of North Carolina is reversed insofar as it upheld the death sentences imposed upon the petitioners, and the case is remanded for further proceedings not inconsistent with this opinion." Woodson v. North Carolina, 428 U.S. at 305.

Significantly, the Supreme Court found it unnecessary, in light of the above dispositions, to bother reaching the defendant's other objections to his death sentence:

"Our determination that the death sentences in this case were imposed under procedures that violated constitutional standards makes it unnecessary to reach the question whether imposition of the death penalty on petitioner Woodson would have been so disproportionate in comparison in the nature of his involvement in the capital offense as independently to violate the Eighth and Fourteenth Amendments." Ibid., fn. 40.

A ruling on this more particularized question would surely have been in order if, on remand, Woodson still stood vulnerable to imposition of the death penalty.

See also, Rose v. Hodges, 96 S.Ct. 175 (1975), where summary disposition was opposed by Mr. Justice Marshall on the grounds that a governor's commutation order which followed in the wake of Furman might actually be "the sentencing stage" since "there existed no viable death sentence to commute." 96 S.Ct. at 179.

III.

The conclusion is inescapable that the United States Supreme Court's own understanding of the import of its death penalty decisions is to free those on death row from any possible imposition of the death penalty once the death penalty statute is ruled unconstitutional. The majority of the Idaho Supreme Court, in refusing to accept this conclusion, behaves like the immature Roper in Robert Bolt's play, A Man for All Seasons. Roper objects when Thomas More, the Lord Chancellor of England and the greatest jurist of his century, refuses to arrest Richard Rich who is soon to perjure himself so that Henry VIII may rid himself of More:

ROPER	(Exasperated, points after RICH) While you talk, he's gone.
MORE	And go he should, if he was the Devil himself, until he broke the law!
ROPER	So now you'd give the Devil benefit of law!
MORE	Yes. What would you do? Cut a great road through the law to get after the Devil?
ROPER	I'd cut down every law in England to do that!
MORE	Oh? And when the last law was down and the Devil turned round on you--where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast--man's laws, not God's--and if you cut them down--and you're just the man to do it--d'you really think you could stand upright in the winds that would blow then?

If the people of Idaho support the existence of a death penalty in this State for another century, it is unlikely that a more satanic candidate than Thomas Eugene Creech will ever merit its sanction. For a mass murderer to escape death because of what appears to be a legal technicality will be judged by the people and the press to be, in Roper's words, "sophistication upon sophistication." Still, it is the business of this Court to uphold the laws, not to lay them all flat in order to get at anyone, not even a Creech, not even a Lindquist.³

I would hold, as did the Court of Criminal Appeals of Oklahoma:

"After an exhaustive study of the opinions rendered by the Supreme Court of the United States, this Court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as the laws have been duly enacted conforming to the standards set forth in *Furman v. Georgia* [and *Woodson v. North Carolina*]." *Pate v. State*, 507 P.2d 915, 916 (Okla.Cr. 1973).

This Court should conclude, along with our sister states, that once a death penalty statute is held to be unconstitutional, it is void ab initio. Therefore, the death sentence passed upon Thomas Creech is a nullity. On remand, the trial court may impose sentence of life imprisonment--as being the maximum penalty for the lesser included offense of second degree murder--but may not impose the death penalty.

BAKES, J., concurs.

³ *State v. Lindquist*, ___ Idaho ___, ___ P.2d ___ (1977), decided on the same rationale as *State v. Creech*.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

THE STATE OF IDAHO,)	Case No. 2165
)	
Plaintiff,)	
)	
vs.	)	CERTIFICATE OF EXHIBITS
)	
THOMAS EUGENE CREECH,)	
)	
Defendant.)	

I, JOHN W. GAMBEE, Official Court Reporter of the
District Court of the Fourth Judicial District of the State
of Idaho, in and for the County of Ada, do hereby certify:

That the following exhibits, namely: Plaintiff's
Exhibits numbered 1 and 2, and Defendant's A, B, C and D
are all of the Exhibits which were marked for identification
and used or considered at the hearing, Motion to Suppress,
10-3-75, in Wallace, Idaho;

That the following exhibit, namely: Defendant's
Exhibit No. E was marked for identification and used or
considered at the Pre-trial hearing on 10-6-75, at Wallace,
Idaho;

That the following exhibits, namely: Plaintiff's
Exhibits numbered 1-A, B, C, G, J, L, M, 3, 3-A, 4, 5, 6,
7, 10, 11, 12, 13, 17, 18, 22, 23, 24, 25, 25-A, 26, 27,
27-A, 28-A, B, C, D, E, F, G, 29-A, B, C, D, 30, 41, 42,
43, 44, 45, 46, 47, 48, 49, 49-A, 50, 51, 52, 53, 53-A,
54, 54-A, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66,
67, 68, 69 and 70 and Defendant's Exhibits numbered A, B,

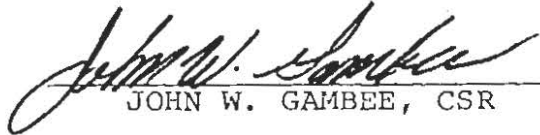
1 C, D, E, F, G, H, I, J, K, L, M, N, are all of the exhibits
2 which were marked for identification and used or considered
3 at the trial of this case at Wallace, Idaho on 10-6-75
4 through 10-22-75;

5 That Plaintiff's Exhibits numbered 1, 1-D, 1-E, 1-F,
6 1-H, 1-I, 1-N, 1-O, 1-P, 1-Q, 2-A, B, C, 14, 15, 16, 19
7 and 29-E which were marked for identification prior to the
8 trial of the case in Valley County, Cascade, Idaho and
9 transferred to Wallace, Idaho for the trial of the matter
10 were not used or admitted into evidence;

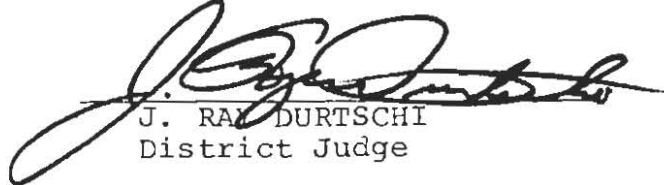
11 That Exhibits 31 through 40 being "Q" Exhibits that
12 were marked as separate Exhibits in Cascade were included as
13 part of Exhibit No. 47 in the Trial in Wallace, Idaho and
14 admitted into evidence;

15 That Exhibits 20 and 21 were marked at Cascade, Idaho
16 and changed to Defendant's Exhibits A and B and admitted
17 into evidence at Wallace, Idaho

18 IN WITNESS WHEREOF, I have hereunto set my hand and
19 affixed the seal of my commission this 16th day of
20 December, 1976.

21 
22 JOHN W. GAMBIE, CSR

23 APPROVED BY AND VERIFIED, This 16th day of
24 December, 1976.

25 
26 J. RAY DURTSCHI
District Judge

27 Received the Exhibits listed above this _____ day
28 of _____, 1976.

29 CLERK OF THE SUPREME COURT

30 By: _____

1 C,D, E, F, G, H, I, J, K, L, M, N, are all of the exhibits
2 which were marked for identification and used or considered
3 at the trial of this case at Wallace, Idaho on 10-6-75
4 through 10-22-75;

5 That Plaintiff's Exhibits numbered 1, 1-D, 1-E, 1-F,
6 1-H, 1-I, 1-N, 1-O, 1-P, 1-Q, 2-A, B, C, 14, 15, 16, 19
7 and 29-E which were marked for identification prior to the
8 trial of the case in Valley County, Cascade, Idaho and
9 transferred to Wallace, Idaho for the trial of the matter
10 were not used or admitted into evidence;

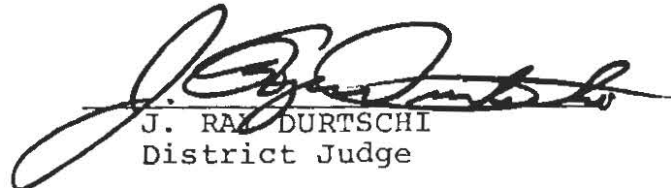
11 That Exhibits 31 through 40 being "Q" Exhibits that
12 were marked as separate Exhibits in Cascade were included as
13 part of Exhibit No. 47 in the Trial in Wallace, Idaho and
14 admitted into evidence;

15 That Exhibits 20 and 21 were marked at Cascade, Idaho
16 and changed to Defendant's Exhibits A and B and admitted
17 into evidence at Wallace, Idaho

18 IN WITNESS WHEREOF, I have hereunto set my hand and
19 affixed the seal of my commission this 16th day of
20 December, 1976.

21 
22 JOHN W. GAMBEE, CSR

23 APPROVED BY AND VERIFIED, This 16th day of
24 December, 1976.

25 
26 J. RAY DURTSCHI
District Judge

27 Received the Exhibits listed above this 18th day
28 of February, 1977, with the exception of Plaintiff's
29 Exhibits 63, -64 and 1-0. (1-0 not
30 admitted).

CLERK OF THE SUPREME COURT

By: 

ORIGINAL

ROBINSON & JONES, P. A.
Attorneys at Law
P. O. Box 8
Nampa, Idaho 83651
Phone: 466-9284

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * *

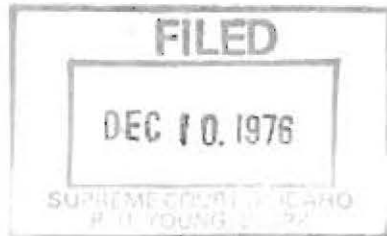
THE STATE OF IDAHO,)
)
Plaintiff-Respondent,)
)
-vs-)
)
THOMAS EUGENE CREECH,)
)
Defendant-Appellant.)

No. 12224

MOTION FOR EXTENSION OF
TIME TO FILE BRIEF

COMES NOW the Defendant-appellant, THOMAS EUGENE CREECH,
by and through his counsel of record, BRUCE O. ROBINSON, Esq., of
the law firm of ROBINSON & JONES, P. A., Nampa, Idaho, and hereby
moves this Court for an extension of time of thirty (30) days,
until the 7th day of January, 1977, in which to file Appellant's
Brief in this action.

Dated this 8th day of December, 1976.



ROBINSON & JONES, P. A.
By: [Signature]
BRUCE O. ROBINSON
Counsel for Defendant-Appellant

O R D E R

IT IS SO ORDERED.

Dated this 16th day of December, 1976.

[Signature]
SUPREME COURT JUSTICE Clerk

CERTIFICATE OF MAILING

I hereby certify that I did, on the 8th day of December, 1976, serve a copy of the within and foregoing Motion for Extension of Time to File Brief in the above-entitled action, upon the following:

ROBERT REMAKLUS
Prosecuting Attorney
Valley County Courthouse
Cascade, Idaho 83611

WAYNE L. KIDWELL
Attorney General
Room 225, Statehouse
Boise, Idaho 83720

by depositing a copy of the same in the United States Mail, postage prepaid, in an envelope addressed to each of the above-named persons at their addresses as the same are last known to me.


BRUCE O. ROBINSON

ORIGINAL

1 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
2 STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

3 Supreme Court No. 12224

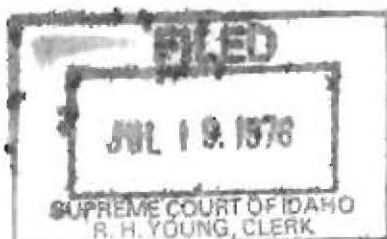
4
5 THE STATE OF IDAHO,) Case No. 2165
6 Plaintiff,)
7 vs.) ORDER EXTENDING TIME FOR
8 THOMAS EUGENE CREECH,) REPORTER'S TRANSCRIPT ON
9 Defendant.) APPEAL

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Good cause being shown therefore, it is hereby ordered
that the Official Reporter of the above-entitled court, have
an additional ninety (90) days to complete the transcript on
appeal in the above-entitled matter.

Dated this 19th day of July, 1976.

J. Boyd Dantche
District Judge

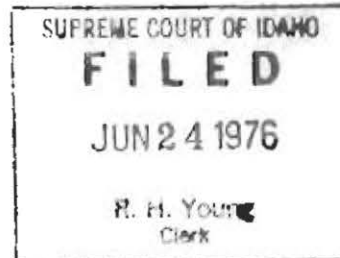


DISTRIBUTED

JUN 24 1976

Petitioner Pro Se
Thomas Eugene Creech
P.O. Box 7309
Boise, Id. 83707
June 21, 1976 #12224

Gouvernor Andras
Capitol Building
Gouvernor's Office
Boise, Id. 83702



RE: Interstate Transfer, Pending Criminal Charges.

Honorable Sir,

I am writing in regards to the actions of other states who are at present trying to secure custody of me in order that I be held to face further criminal prosecution in those states.

I respectfully make the following three claims to clarify my position and secure the protection of my constitutional rights:

- #1.- At the time of my arrest and trial here in Idaho my attorney did file with each state that has secured a detainer against me, a motion for a quick and speedy trial, this was done in June of 1975, since the filing no state has made an effort within the prescribed time limit after such a motion to bring me to trial. Therefore I believe they have lost jurisdiction to do so now or in the future.
- #2.- The Assistant Attorney General Ronald Bruce of this state has sent me a copy of his motion for the temporary transfer of prisoner, that as I understand, is to be heard and acted upon by the Idaho Supreme Court. This being the case, I now would like to inform your office that before the honorable court acts upon any such motion I wish to secure my constitutional rights to be present at any such hearing, to be allowed to present my side in opposition to any such motion, or have my legal representative present to defend my constitutional rights of due process and equal protection on these matters at any such hearing. And a failure of the court not to allow me to be heard on this matter is a violation of those rights.

#3 - I also, understand both California & Oregon have requested me for trial by and through the Interstate Agreement on Detainers - Temporary Custody Clause - that under this agreement I have the right to petition in protest to your office; therefore, by and through this understanding I hold and maintain neither State has a legal right to obtain or secure my presence to stand charges pending, because with my previous request and thier delay they have lost such authority.

That further, the Idaho Supreme Court does not have the authority to rule on the State's motion for transfer, when in so doing I am not allowed to defend or protect my interest at any such hearing.

That, this letter be accepted and noticed by your office as my official attempt to protect and secure my Constitutional rights in these matters because at present on death row here at the institution I have no other way, legal advisor on my behalf, nor representative accessible to secure and protect my Constitutional rights in these matters.

And I respectfully request that until such a time as I am legally represented; fully advised and protected in these matters, that all such attempts or processes to secure my person for trial in any other State be suspended.

Respectfully Submitted and Requested;

June 21, 1976

Petitioner Pro Se

C.C. File

Governor's Office
RONALD BRUCE
Idaho Supreme Court

HONORABLE Sir,

I RESPECTFULLY Request THAT this Letter be:
Filed in your COURT, AND MADE public record,

Thank you,
Respectfully
Thomas E. Creech

ORIGINAL

DISTRICT ATTORNEY

JUN 3 1976

WAYNE L. KIDWELL
Attorney General
State of Idaho

GORDON S. NIELSON
Senior Deputy Attorney General
Chief, Criminal Justice Division
State of Idaho

RONALD D. BRUCE
Assistant Attorney General
Corrections Section
Statehouse, Boise, Idaho 83720
Telephone: 384-2400

IN THE SUPREME COURT OF THE STATE OF IDAHO

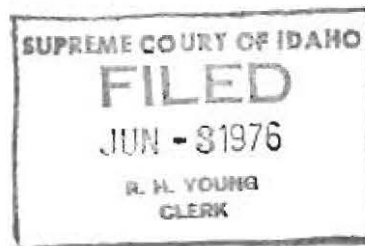
STATE OF IDAHO,)	
)	
Plaintiff and)	
Respondent.)	
	)	Supreme Court No. 12224
-vs-)	
)	
THOMAS EUGENE CREECH,	)	MOTION FOR TEMPORARY
)	
Defendant and	)	TRANSFER OF PRISONER
Appellant.)	

The Idaho Department of Correction, through its attorneys Wayne L. Kidwell, Attorney General, State of Idaho, and Ronald D. Bruce, Assistant Attorney General, State of Idaho, respectfully move this Honorable Court to allow the Idaho Department of Correction to temporarily transfer Thomas Eugene Creech to the States of Oregon and California for the purpose of answering criminal charges pending against him in those states, under the Interstate Agreement on Detainers, Idaho Code Sections 19-5001 et seq.

DATED this second day of June, 1976.

Ronald D. Bruce

RONALD D. BRUCE
Assistant Attorney General



ORIGINAL

WAYNE L. KIDWELL
Attorney General
State of Idaho

GORDON S. NIELSON
Senior Deputy Attorney General
Chief, Criminal Justice Division
State of Idaho

RONALD D. BRUCE
Assistant Attorney General
Corrections Section
Statehouse, Boise, Idaho 83720
Telephone: 384-2400

IN THE SUPREME COURT OF THE STATE OF IDAHO

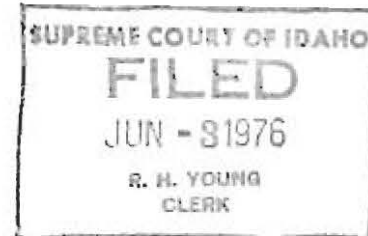
STATE OF IDAHO,)	
)	
Plaintiff and	)	Supreme Court No. 12224
Respondent.)	
)	
-vs-	)	MEMORANDUM IN
)	
THOMAS EUGENE CREECH,	)	SUPPORT OF MOTION
)	
Defendant and)	
Appellant.)	

The Idaho Department of Correction has presented its "Motion for Temporary Transfer of Prisoner" to obtain judicial approval for its proposed solution to conflicting duties imposed upon the agency by the Idaho Code.

The Interstate Agreement on Detainers at Idaho Code Sections 19-5001 et seq. encourages party states, prisoners and the Department of Correction to assist prisoners in the speedy disposition of criminal charges pending against such prisoners in other states.

19-5001(a) The party states find that charges outstanding against a prisoner, detainers based on untried indictments information or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct the policy of the party states and the purpose of this agreement to encourage the speedy programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

19-5003. COOPERATION OF OFFICIALS.--All courts, departments, agencies, officers and employees of this state and its political



subdivisions are hereby directed to enforce the agreement on detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose.

19-5006. MANDATORY DELIVERY OF CUSTODY. --It shall be lawful and mandatory upon the director of correction in charge of the Idaho state prison to give over the person of any inmate thereof whenever so required by the operation of the agreement on detainers.

The Department of Correction is under an additional responsibility in the case of prisoner Thomas Eugene Creech. Creech was convicted of murder in the first degree and sentenced to death in accordance with the mandates of Idaho Code section 18-4004. See exhibit A, attached hereto. This fact calls into operation the provisions of the Idaho Code relating to execution, and specifically that section which requires that prisoners under sentence of death be kept in solitary confinement.

19-2705. DEATH WARRANT AND CONFINEMENT THEREUNDER. -- Whenever a person is convicted of a crime the penalty for which is death, and such convicted person be sentenced to suffer the penalty of death, the judge passing such sentence shall designate in the warrant of conviction a day in which the judgment is to be executed, which must not be less than thirty nor more than sixty days from the date of said judgment. Said warrant shall be directed to the warden of the state penitentiary of this state, and shall be delivered to the sheriff of the county wherein said conviction is had, who shall deliver the same to the warden of the state penitentiary or his authorized guard at the time of the delivery of the person, and a copy of the judgment has herein provided for. The said warden of the state penitentiary shall keep said convicted person in solitary confinement until the infliction of the death penalty; and no person shall be allowed access to the said convict, except his attendants, counsel, physician, spiritual advisor of his own selection, and members of his own family, and then only in accordance with the prison rules.

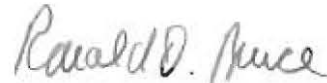
The Idaho Department of Correction has taken the position that the "Order Staying Execution" dated April 5, 1976, by the Honorable J. Ray Durtschi, only operates to stay the date of execution but does not alter Creech's status as a prisoner under penalty of death and under the restrictions imposed by Idaho Code Section 19-2705. A copy of that "Order Staying Execution" is attached hereto as exhibit B.

The State of Oregon and the State of California have both filed requests for temporary custody under the Interstate Agreement on Detainers. See the documents attached as exhibit C. Creech has indicated to officials of the Department of Correction that he is anxious to have those outstanding Oregon and California criminal charges disposed of.

The Department of Correction feels that the solution to this conflict in its duties is to allow Oregon and California to have temporary custody of Creech for the purpose of disposing of their outstanding criminal charges against him. The requirements for keeping inmates under the penalty of death in solitary are surely based upon notions of security. To the extent that such security is temporarily compromised by normal prisoner custody while he avails himself of the opportunity to defend himself on other criminal charges in Oregon and California, then to that extent the Department of Correction should receive judicial approval for such compromise.

DATED this second day of June, 1976.

FOR THE ATTORNEY GENERAL



RONALD D. BRUCE
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this second day of June, 1976, I served a true copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION by sending such copy to the attorney of Thomas Eugene Creech, Bruce Robinson, by placing such copy in the U. S. mails, first class postage prepaid, addressed to: Mr. Bruce Robinson, P. O. Box 8, Nampa, Idaho 83651; and by also placing a true and correct copy thereof in the prison mail system addressed to Thomas Eugene Creech, #14.984.



CARMEN L. BIRD
Administrative Secretary

1983
14-2576

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

STATE OF IDAHO,)	
)	
Plaintiff,)	
	)	Case No. 2165
v.)	
	)	JUDGMENT OF CONVICTION
THOMAS EUGENE CREECH,)	
)	
Defendant.)	

The Prosecuting Attorney with the Defendant, Thomas Eugene Creech, and his counsel, Bruce Robinson, came into Court in Boise, Ada County, Idaho, on the 25th day of March, 1976.

The Defendant was duly informed by the Court as follows:

The Defendant was advised of the nature of the information filed against him for the crime of murder in the first degree on two counts committed on or about the 4th day of November, 1974; of his arraignment on December 4, 1974 and of the continuation thereof until January 8, 1975, for the entry of this plea; of his appearance with the Public Defender of Valley County, Idaho, as his attorney on the said 8th day of January, 1975, and his entry of a plea of "not guilty to two counts of murder in the first degree"; of the commencement of his trial at Cascade, Valley County, Idaho, on the 20th day of May, 1975, and of his Motion for Change of Venue on the 21st day of May, 1975, and of the Order of this Court made May 22, 1975, granting such Motion for Change of Venue; of the Order entered June 18, 1975, pursuant to hearing on June 4, 1975, granting his Motion for Change of Attorney and of his selection of Bruce Robinson as his attorney herein; of the hearing on

EXHIBIT A

July 10, 1975, for change of venue to Shoshone County and the entry of an Order therefore on the 14th day of July, 1975; of the hearing on August 14, 1975, pursuant to Stipulation, whereat the trial was set for October 6, 1975 in Shoshone County, Idaho; that such trial commenced October 6, 1975, and that on October 22, 1975, a verdict of guilty to two counts of murder in the first degree was returned; the Defendant was advised that every person found guilty of murder in the first degree shall suffer death.

The Defendant was then asked if he had any statement to make before sentence was pronounced to which he replied that he had none. The Defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him to which he replied that he had none. Thereupon the Court renders its judgment: That whereas the said Defendant, Thomas Eugene Creech, having been duly convicted in this Court of the crime of two counts of murder in the first degree,

It is therefore ordered, adjudged and decreed that the said Defendant, Thomas Eugene Creech, is guilty of the crime of murder in the first degree upon two counts and as punishment therefore he shall upon each count suffer death in the manner provided by the statutes of the State of Idaho on the 21st day of May, 1976.

The Defendant was then remanded to the custody of the Sheriff of the County of Ada, State of Idaho, to be delivered by him into the custody of the Director of the State Board of Corrections, State of Idaho, for execution of such sentence.

DATED This 25th day of March, 1976.


J. Ray Durschi
District Judge

14-983
3-25-76

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

STATE OF IDAHO,)	
)	
Plaintiff,)	
	)	Case No. 2165
v.)	
	)	<u>DEATH WARRANT</u>
THOMAS EUGENE CREECH,)	
)	
Defendant.)	

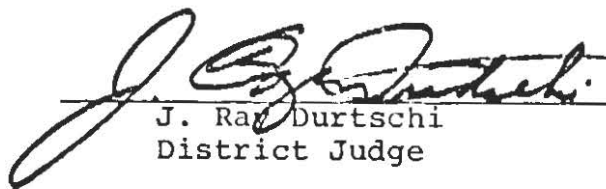
TO: DIRECTOR, BOARD OF CORRECTIONS, STATE OF IDAHO, as
Warden of the Idaho State Correctional Institution:

GREETING:

WHEREAS Thomas Eugene Creech was, by information, duly charged by the Prosecuting Attorney of Valley County, Idaho, with the offense of murder in the first degree, two counts, and thereafter was tried and on the twenty second day of October, 1975, at Wallace, Shoshone County, Idaho, was found by a jury of 12 persons to be guilty as charged and judgment of conviction was duly entered by our District Court on the 25th day of March, 1976, a copy of which judgment is attached hereto and incorporated herein, and the sentence of death imposed upon the Defendant Thomas Eugene Creech as required by law, which judgment has not been executed,

YOU ARE THEREFORE COMMANDED to execute the judgment of death upon the Defendant Thomas Eugene Creech on the 21st day of May, 1976, by hanging him by the neck until he is dead, in the manner prescribed by law, and thereafter make your return as provided by law. These presents shall be your authority to do as aforesaid. Herein fail not.

DATED This 25th day of March, 1976.


J. Ray Durtschi
District Judge

ROBINSON & JONES, P.A.
Attorneys at Law
P. O. Box 8
Nampa, Idaho 83651
Phone: 466-9284

DO _____
FILED
A.M. _____ P.M. _____
APR 5 1976
J.W. Creech CLERK
BY *Mary A. Hill* DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

* * * * *

STATE OF IDAHO,
Plaintiff,
-vs-
THOMAS EUGENE CREECH,
Defendant.

Case No. 2165

ORDER STAYING EXECUTION

A Motion for an order staying execution of the judgment heretofore entered in the above-entitled action having been made by the Defendant, and the court being fully advised in the premises, and good cause appearing therefor;

IT IS HEREBY ORDERED and this does hereby ORDER that said motion be, and the same is hereby, granted, and that the execution of the judgment entered on the 25th day of March, 1976, be, and the same is hereby, stayed until further order of this court.

Dated this 5th day of April, 1976.

J. J. [Signature]
DISTRICT JUDGE

STATE OF IDAHO } ss.
COUNTY OF ADA }
I, Clarence A. Planting, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original on file in this office. In witness whereof, I have hereunto set my hand and affixed my official seal this 13th day of April 1976.
CLARENCE A. PLANTING, Clerk
By *Mary A. Hill* Deputy

ORDER STAYING EXECUTION

EXHIBIT B

Five copies Signed copies must be sent to the prisoner and to the official who has the prisoner in custody. A copy should be sent to the Agreement Administrator of the state which has the prisoner incarcerated. Copies should be retained by the person filing the request and the judge who signs the request.

REQUEST FOR TEMPORARY CUSTODY

TO: Donald R. Erickson, Director of Corrections Idaho State Penitentiary
 (Warden - Superintendent - Director) (Institution)
Box 7309, Boise, Idaho 83707
 (address)

Please be advised that THOMAS E. CREECH, who is presently an inmate of your institution, is under [XXXXXXXXXX] [XXXXXXXXXX] [complaint] in the Sacramento County Municipal Court District of which I am the Chief Deputy District Attorney
 (jurisdiction) (title of prosecuting officer)

Said inmate is therein charged with the [offense] [offenses] enumerated below:

Offense
Murder First Degree

I propose to bring this person to trial on this [XXXXXXXXXX] [XXXXXXXXXX] [complaint] within the time specified in Article IV(c) of the Agreement.

In order that proceedings in this matter may be properly had, I hereby request temporary custody of such persons pursuant to Article IV(a) of the Agreement on Detainers.

I hereby agree that immediately after trial is completed in this jurisdiction I will return the prisoner directly to you or allow any jurisdiction you have designated to take temporary custody. I agree also to complete Form IX, the Notice of Disposition of a Detainer, immediately after trial.

Signed [Signature]
 Title Chief Deputy District Attorney
County of Sacramento

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV. (a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers.

DATED: MAR 30 1976

Signed [Signature]
 (Judge)
 TO 170 (4-77-74)

EXHIBIT C

MAR 26 1976

Five copies. Signed copies must be sent to the prisoner and the official who has the prisoner in custody. A copy should be sent to the Agreement Administrator of the state which has the prisoner incarcerated. Copies should be retained by the person filing the request and the judge who signs the request.

REQUEST FOR TEMPORARY CUSTODY

TO: DON ERIKSON, Director of Idaho State Correctional Institution
& TO: BOARD OF CORRECTIONS, Idaho State Correctional Institution
(Warden - Superintendent - Director) (Institution)

Box 7309, Boise, Idaho, 83707
(address)

Please be advised that THOMAS EUGENE CREECH, who is presently an inmate or your institution, is under [indictment] [XXXXXXXXXX] in the State of Oregon, County of Multnomah, of which I am the District Attorney (jurisdiction) (title of prosecuting officer)

Said inmate is therein charged with the [offense] [XXXXXXXXXX] enumerated below

Offense

MURDER

I propose to bring this person to trial on this [indictment] [XXXXXXXXXX] within the time specified in Article IV(c) of the Agreement.

In order that proceedings in this matter may be properly had, I hereby request temporary custody of such person pursuant to Article IV(a) of the Agreement on Detainers

I hereby agree that immediately after trial is completed in this jurisdiction I will return the prisoner directly to you or allow any jurisdiction you have designated to take temporary custody. I agree also to complete Form IX, the Notice of Disposition of a Detainer, immediately after trial.

HARL HAAS, District Attorney
Multnomah County, Oregon

Signed By: Joel Grayson
Title: Sr. Deputy District Attorney

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV (a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers.

DATED: March 25 1976

Signed Pat Dooley
(Judge)
Pat Dooley
Judge of the Circuit Court
Multnomah County, Oregon

In the District Court of the FIRST Judicial District of the
State of Idaho, In and for SHOSHONE County

Supreme Court No. 12224

STATE OF IDAHO,

Robert Remaklus & Lynn E. Thomas
Attorney

Plaintiff

vs.

THOMAS EUGENE CREECH

CLERK'S CERTIFICATE ON
PERFECTION OF APPEAL

Bruce O. Robinson

Attorney

Defendant

Appeal from First Judicial District Court

Judgment: Date March 25, 1976

Amount

Character Murder First Degree, Two Counts

Appealed by Notice of Cross Appeal, filed Apr. 23, 1976 by Plaintiff

Notice of Appeal filed April 23, 1976

Undertaking on Appeal filed -----

Praecipe for Clerk's record filed -----

Have fees been paid? -----

Order for Reporter's transcript filed -----

Limit fixed for Reporter's transcript -----

STATE OF IDAHO,

County of Shoshone

} ss.

I, VICTORIA WHITE, Clerk of the District Court of the First Judicial

District of Idaho, in and for the County of Shoshone, do hereby certify that the dates

and statements above are as shown by the record in the above entitled case now in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official

seal this 18 day of May, 19 76.

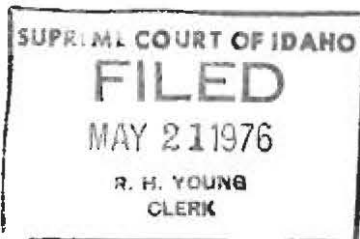
VICTORIA WHITE

Clerk of the District Court.

By

Margaret Lindley

Deputy.



ORIGINAL

Filed
April 23, 1976
M. Smith
District Judge

WAYNE L. KIDWELL

Attorney General
State of Idaho
Statehouse, Room 210
Boise, Idaho 83720
Telephone: (208) 384-2400

LYNN E. THOMAS
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO

IN THE DISTRICT COURT OF THE ^{First} ~~Fourth~~ JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ^{Shoshone} ~~Valley~~

STATE OF IDAHO,
Plaintiff,
v.
THOMAS EUGENE CREECH,
Defendant.

Supreme Court No. 12224

Case No. 2165

NOTICE OF CROSS APPEAL

TO: The Clerk of the above-captioned Court, the Defendant, THOMAS EUGENE CREECH, and to his attorney, Bruce O. Robinson.

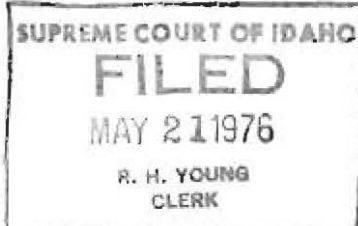
YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the State of Idaho, Plaintiff, does hereby cross appeal to the Supreme Court of the State of Idaho from the following rulings relating to the receipt of evidence and other matters occurring during the trial of the above-captioned matter:

(1) From the ruling of the trial court rejecting the testimony of Gene Hilby during the State's case in chief;

(2) From the ruling of the trial court rejecting the testimony of Joe Carl Adams during the State's case in chief;

(3) From the ruling of the trial court excluding admissions and confessions of the Defendant from evidence in the State's case in chief;

(4) From the ruling of the trial court denying Plaintiff's motion to permit the prosecution to ask leading questions of the witness Carol Spaulding;




1 (5) From the ruling of the trial court denying the State's
2 Motion in Limone.

3 DATED This 23 day of April, 1976.

4 Respectfully submitted,

5 WAYNE L. KIDWELL
6 ATTORNEY GENERAL

7
8 

9 LYNN E. THOMAS
10 Deputy Attorney General
State of Idaho

11 CERTIFICATE OF MAILING

12 I HEREBY CERTIFY That I have this 23 day of April, 1976,
13 served a true and correct copy of the above NOTICE OF CROSS APPEAL,
14 by placing a copy in the United States mail, postage prepaid, and
15 addressed to Mr. Bruce O. Robinson, Attorney at Law, P.O. Box 8,
16 Nampa, Idaho 83651, counsel for Defendant.

17
18 

19 LYNN E. THOMAS
20 Deputy Attorney General
State of Idaho

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WAYNE L. KIDWELL
ATTORNEY GENERAL
STATE OF IDAHO
STATEHOUSE, ROOM 225
BOISE, IDAHO 83720
TELEPHONE: (208) 384-2400

ORIGINAL

In the District Court of the FIRST Judicial District of the
State of Idaho, In and for SHOSHONE County

STATE OF IDAHO

Supreme Court No. 12224

Robert Remaklus & Lynn E. Thomas
Attorney

Plaintiff

CLERK'S CERTIFICATE ON
PERFECTION OF APPEAL

vs.

THOMAS EUGENE CREECH

Bruce O. Robinson

Attorney

Defendant

Appeal from First Judicial District Court12-2-75 Notice appealing from Order denying defts. Motion for New Trial;Judgment: Date 1-22-76 Order to set aside Verdict & 4-1-76 appealing from

Judgment of conviction - Judgment filed March 25, 1976

Amount

Character Murder First Degree, Two CountsAppealed by Defendant, Thomas Eugene CreechNotice of Appeal filed Dec. 2, 1975, Jan 22, 1976 and Apr. 1, 1976Undertaking on Appeal filed -----Praecipe for Clerk's record filed April 1, 1976Have fees been paid? -----Order for Reporter's transcript filed April 5, 1976Limit fixed for Reporter's transcript 90 days

STATE OF IDAHO,

County of Shoshone

} ss.

I, VICTORIA WHITEClerk of the District Court of the First JudicialDistrict of Idaho, in and for the County of Shoshone, do hereby certify that the dates

and statements above are as shown by the record in the above entitled case now in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official

seal this 18th day of May, 19 76.

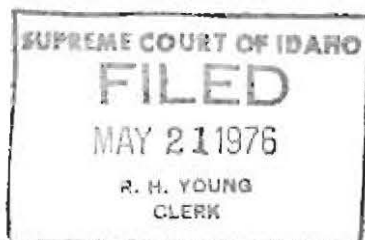
VICTORIA WHITE

Clerk of the District Court.

By

Margaret Lindsey

Deputy.



ROBINSON & JONES, P.A.
Attorneys at Law
P. O. Box 8
Nampa, Idaho 83651
Phone: 466-9284

FILED

DEC-2 1975

BY *Mary A. Hall*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

* * * * *

STATE OF IDAHO,
Plaintiff,
-vs-
THOMAS EUGENE CREECH,
Defendant.

Case No. 2165

NOTICE OF APPEAL

COMES NOW the above-named Defendant, THOMAS EUGENE CREECH, by and through his Counsel of record, and gives Notice to the State of Idaho, pursuant to Idaho Code 19-2806, of the Defendant's Appeal of that certain Order dated November 4, 1975, denying Defendant's Motion for a new trial and his Motion for appointment of court-appointed counsel.

Dated this 18th day of December, 1975.

ROBINSON & JONES, P.A.

By *[Signature]*
BRUCE O. ROBINSON
Counsel for Defendant

NOTICE OF APPEAL

ROBINSON & JONES, P.A.
Attorneys at Law
P. O. Box 8
Nampa, Idaho 83651
Phone: 466-9284

FILED
JAN 22 1976
mary a full

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

* * * * *

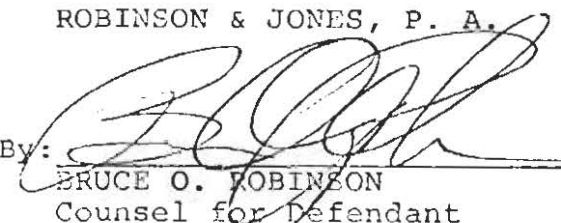
STATE OF IDAHO,)
)
Plaintiff,)
)
-vs-)
)
THOMAS EUGENE CREECH,)
)
Defendant.)

Case No. 2165
NOTICE OF APPEAL

COMES NOW the above-named Defendant, THOMAS EUGENE CREECH, by and through his Counsel of record, BRUCE O. ROBINSON, Esq., of the law firm of ROBINSON & JONES, P. A., and gives Notice to the State of Idaho, pursuant to Idaho Code, §19-2806, of the Defendant's Appeal of that certain Order Denying Motion to Set Aside Verdict, dated the 13th day of January, 1976.

Dated this 20th day of January, 1976.

ROBINSON & JONES, P. A.

By: 
BRUCE O. ROBINSON
Counsel for Defendant

NOTICE OF APPEAL

ROBINSON & JONES, P.A.
Attorneys at Law
P. O. Box 8
Nampa, Idaho 83651
Phone: 466-9284

FILED

A.M. P.M.
APR 1 1976
J. W. Crutcher
Clerk
Mary A. Hill
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

* * * * *

STATE OF IDAHO,
Plaintiff,
-vs-
THOMAS EUGENE CREECH,
Defendant.

Case No. 2165

NOTICE OF APPEAL

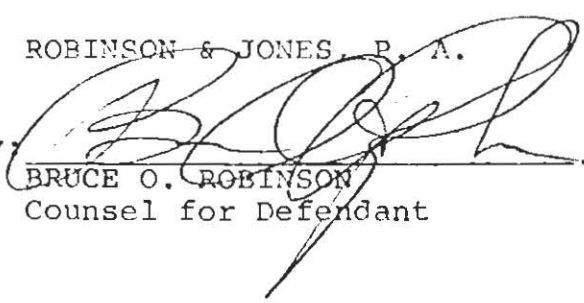
TO: The Clerk of the above-captioned Court; the Plaintiff,
STATE OF IDAHO, and its counsel of record, LYNN A.
THOMAS, Deputy Attorney General, State of Idaho, and
ROBERT H. REMAKLUS, Prosecuting Attorney for Valley
County, State of Idaho.

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that
the Defendant, THOMAS EUGENE CREECH, does hereby appeal to
the Supreme Court of the State of Idaho, from that certain
Judgment made and entered in the above-entitled court and cause
on or about the 25th day of March, 1976.

This appeal is taken from the whole of said Judgment
and is taken on questions of both fact and law.

DATED this 29th day of March, 1976.

ROBINSON & JONES, P.A.

By: 
BRUCE O. ROBINSON
Counsel for Defendant

NOTICE OF APPEAL

ORIGINAL

ROBINSON & JONES, P.A.
Attorneys at Law
P. O. Box 8
Nampa, Idaho 83651
Phone: 466-9284

FILED

APR 1 1976

J. W. Cretcher
CLERK

Mary A. Hill
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

* * * * * Supreme Court No. 12224

STATE OF IDAHO,
Plaintiff,
-VS-
THOMAS EUGENE CREECH,
Defendant.

Case No. 2165

NOTICE OF APPEAL

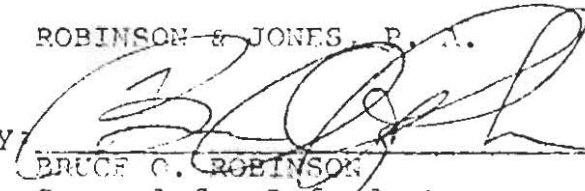
TO: The Clerk of the above-captioned Court; the Plaintiff,
STATE OF IDAHO, and its counsel of record, LYNN A.
THOMAS, Deputy Attorney General, State of Idaho, and
ROBERT H. REMAKLUS, Prosecuting Attorney for Valley
County, State of Idaho.

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that
the Defendant, THOMAS EUGENE CREECH, does hereby appeal to
the Supreme Court of the State of Idaho, from that certain
Judgment made and entered in the above-entitled court and cause
on or about the 25th day of March, 1976.

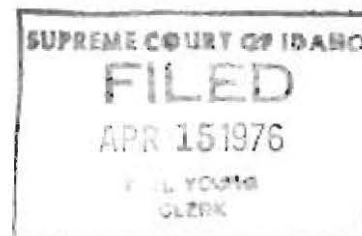
This appeal is taken from the whole of said Judgment
and is taken on questions of both fact and law.

DATED this 29th day of March, 1976.

ROBINSON & JONES, P.A.

By: 
BRUCE C. ROBINSON
Counsel for Defendant

NOTICE OF APPEAL



ROBINSON & JONES, P.A.
Attorneys at Law
P. O. Box 8
Nampa, Idaho 83651
Phone: 466-9284

FILED

Dec-2 1975

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

* * * * *

STATE OF IDAHO,)
) Case No. 2165
Plaintiff,)
)
-vs-) NOTICE OF APPEAL
)
THOMAS EUGENE CREECH,)
)
Defendant.)

COMES NOW the above-named Defendant, THOMAS EUGENE CREECH, by and through his Counsel of record, and gives Notice to the State of Idaho, pursuant to Idaho Code 19-2806, of the Defendant's Appeal of that certain Order dated November 4, 1975, denying Defendant's Motion for a new trial and his Motion for appointment of court-appointed counsel.

Dated this 1st day of December, 1975.

ROBINSON & JONES, P.A.

By: *[Signature]*
BRUCE G. ROBINSON
Counsel for Defendant

SUPREME COURT OF IDAHO
RECEIVED

APR 1 1976

R. H. YOUNG, Clerk

NOTICE OF APPEAL

State of Idaho
Supreme Court

(206) 384-2210

COPY

October 24, 1978

Mr. Thomas E. Creech
Unit # 7
P.O. Box 14
Boise, Idaho 83707


Re: State v. Thomas E. Creech,
Supreme Court No. 12224

Dear Sir:

I am advised by the Chief Justice that he is in receipt of your letter dated October 19, 1978 and I am directed to reply thereto.

Please be advised that the Court is unable to comply with your request as to a date when a decision will be rendered in this case. The matter is proceeding through the usual and customary channels and procedures.

Very truly yours,


R. H. Young
Clerk

RHY:jc

OCT 23 1978

#1473

Thomas F. HEEGL

Unit # 7

P.O. Box 14

Beise, Idaho 83302

Chief Justice

Idaho Supreme Court

451 W. State St.

Beise, Idaho 83302

OCT, 19th 1978

- Thursday -

Dear Sir:

I am writing to you to try and find out when a decision will be made on my case. It has now been a year since the Supreme Court took me off death row. And most of this year I've been awaiting a decision on my case to decide if I'll be re-sentenced to death or given a life sentence.

It's been 4 years now since I was accused here. I've got other charges in other states that I must stand trial for but can't go till my case is decided here. Also all 4 of these years I've been in solitary & maximum security because I can't go to the main population of the prison as long as my case is in limbo.

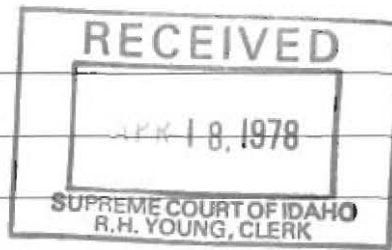
I'm really taking the toll on me & by not getting a decision on my case here it's causing me extreme problems in the defense of my other cases. So I request, fully ask, to please let me know when a decision will be made here on my case. Thank you.

Respectfully,

Tom
Cruick

CC: File

TC/



THOMAS E. CREECH

UNIT # 7

P.O. BOX 14

Boise, Idaho 83707

MR. R. H. YOUNG, CLERK

Idaho Supreme Court

451 W. STATE ST.

Boise, Idaho, 83707

APRIL 14, 1978

DEAR SIR,

I JUST RECEIVED YOUR LETTER OF APRIL 12, 1978, IN RESPONSE TO MY LETTER OF FEB 28, 1978. THANK YOU FOR YOUR REPLY AND I WILL WRITE TO MY ATTORNEY IN THE FUTURE, WITH ANY FURTHER QUESTIONS I HAVE REGARDING THIS MATTER. THANKS AGAIN!
HAVE A NICE DAY!

RESPECTFULLY,

THOMAS E. CREECH #14984

C.C. BRUCE C. ROBINSON - ATTORNEY, Nampa, Idaho.

File

12224

R. H. YOUNG
Clerk of the Supreme Court

State of Idaho
Supreme Court

451 W. STATE STREET
BOISE, IDAHO 83720

(208) 384-2210

COPY

April 12, 1978

Mr. Thomas E. Creech -14984
P.O. Box 7309
Boise, Idaho 83707

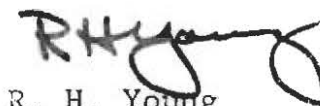
Dear Mr. Creech:

In response to your letter of February 28, 1978 regarding your incarceration at the Idaho State Penitentiary, you stated that your death sentence was vacated and the case remanded for resentencing. You further complain that your rights are being violated since you are being held in the State Penitentiary under no sentence.

After the decision of the Court was announced, your attorney petitioned on your behalf for a rehearing before the Supreme Court, which the Court granted. Therefore, the decision of the Court is held in abeyance until the rehearing and a final decision has been reached. The rehearing has been scheduled for hearing in May 1978.

I suggest if you have any further questions that you write to your attorney directly.

Sincerely yours,



R. H. Young
Clerk

cc: Bruce O. Robinson

BRUCE O. ROBINSON, P.A.

ATTORNEYS AT LAW

ROBINSON

LEW

PHONE (208) 466-9284
P. O. BOX 8
1320 12TH AVE. SO.
NAMPA, IDAHO 83651

March 7, 1978

R. H. "Bill" Young, Clerk
Idaho Supreme Court
451 W. State
Boise, Idaho 83720

Supreme Court No. 12224

Re: Thomas Eugene Creech

Dear Bill:

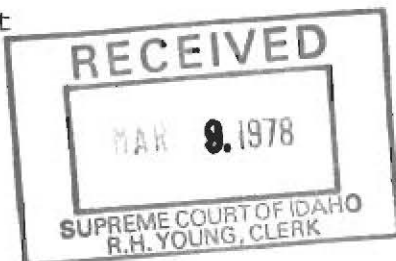
Today I received my copies of Thomas Eugene Creech's correspondence to Warden Anderson and to the Honorable Alan Shepard, Chief Justice. Needless to say, the thought content of this letter caused me to shudder in light of the pending circumstance of his case.

I would assume that the gentlemen of the court will ignore the content of this letter. I will also attempt to more fully explain to Mr. Creech his present position in this world as an inmate convicted of two counts of murder in the first degree. These matters have been discussed with Thomas Eugene Creech on many prior occasions and he apparently has a lapse of memory or is becoming paranoid or stir-crazy. At any rate, we will attempt to control the situation.

Sincerely yours,

Bruce O. Robinson

BOR:st



R. H. YOUNG
Clerk of the Supreme Court

State of Idaho
Supreme Court

(208) 384-2210

451 W. STATE STREET
BOISE, IDAHO 83720

January 10, 1978

Ms. Bunny Dobbs
611 Blaine Street
Caldwell, ID 83605

Re: Supreme Court No. 12224
State v. Creech

Dear Ms. Dobbs:

Your letter of January 4 to the Supreme Court
has been received and called to their attention.

Sincerely,

R. H. Young
Clerk

RHY:mb

COPY

JAN 9 - 1978

January 4, 1978

Supreme Court
Boise Idaho 83702

Supreme Court No. 12224

Dear Sirs:

I just read the Stateman report of Thomas Creech, and the possibility that he might go free.

Is it true that we do not have any laws to protect us? This man has admitted to killing at least fourteen people.

Will he be set free to kill again?

Please try to protect us.

Sincerely,

Bunny Dobbs

Bunny Dobbs

611 Blaine St.

Caldwell Idaho 83605

Bruce O. Robinson
Attorney at Law
Nampa;
Hon. Wayne L. Kidwell
Attorney General
Boise;
Lynn E. Thomas
Deputy Attorney General
Boise

SUPREME COURT
STATE OF IDAHO
Boise, Idaho

SUPREME COURT NO. 12224

December 21, 1977

STATE OF IDAHO,

Plaintiff-Respondent,
& Cross Appellant,


v.

THOMAS EUGENE CREECH,

Defendant-Appellant
& Cross-Respondent.

GENTLEMEN:

.....
In the above entitled cause the Court has today granted Appellant's Petition for Rehearing. Respondent's brief is due on or before January 25, 1978, Appellant's Reply Brief is due on or before February 8, 1978.


.....
CLERK OF THE SUPREME COURT
STATE OF IDAHO

State of Idaho
Supreme Court

(208) 384-2210

451 W. STATE STREET
BOISE, IDAHO 83720

August 24, 1977

Thomas E. Creech - 14984
C/o Idaho State Penitentiary
STATEHOUSE MAIL

Re: State v. Creech, Supreme Court No. 12224

Dear Mr. Creech:

Your letter of August 21st was received today. You made inquiry as to when an opinion will be issued in your appeal. I do not know the precise date, but this case is still before the Court awaiting the issuance of a written opinion. As soon as an opinion is issued in your case you will be sent a copy as will your attorney of record.

Sincerely yours,


R.H. YOUNG, Clerk
IDAHO SUPREME COURT

RHY: bw

Thomas E. Creech-14984
Box 7309
Boise, Idaho 83707

August 21, 1977

R. H. Young, Clerk
IDAHO SUPREME COURT
451 W. State Street
Boise, Idaho 83720

12224

Dear Mr. Young,

I am writing to you in regards to the delay on the part of the Idaho Supreme Court in handing down a decision on my appeal; Supreme Court Case #12224, which was argued before that court on May 5, 1977, in Coeur d' Alene, Idaho.

I would direct your attention back to our last exchange of letters on this issue, at which time you advised me that it would take the Idaho Supreme Court the " better part of the summer months " to hand down a decision in writing on my appeal. Since the waiting period you predicted is now all but over with and I have heard nothing what so ever on that decision, I would like very much to know what the immediate situation is with regards to that decision and when it will be forthcoming.

If you are aware of the reason for the continued delay, please tell me so I might better understand what now appears to be only a " delaying action " on the part of the court. Last week a news article which involved us here on death row I.S.C.I. was ran on Channel 7 and featured comments by Warden Anderson, one of his comments was " ... the inmates now on death row may find themselves there for quite some time to come. " . It would appear from this and other statements made by Warden Anderson that he has received information from some source either as to the direction the decision will take or as to the time that decision will be forthcoming. If such information exists I would greatly appreciate your availing me of it.

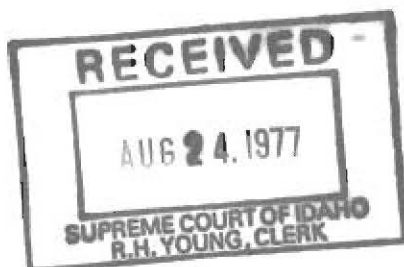
Thank you for your timely consideration in answering this request for information.

Sincerely yours,

Thomas E. Creech #14984

Thomas E. Creech-14984

c/c File.



State of Idaho
Supreme Court

(208) 384-2210

June 14, 1977

Mr. Thomas E. Creech
P. O. Box 7309
Boise, Idaho

Re: S. C. #12224
State v. Creech

Dear Mr. Creech:

Your letter of June 10, 1977, addressed to the Chief Justice has been given to me for answering.

Your appeal argued last month is still under consideration by the Court. The Court will devote a good part of the summer months to consideration of cases and writing of opinions in cases recently argued before the Court.

As soon as the Court has rendered its opinion we will send both you and your counsel, Mr. Bruce O. Robinson, a copy of that opinion.

Sincerely yours,

R. H. Young,
Clerk

RHY:mah

R. H. YOUNG
Clerk of the Supreme Court

State of Idaho
Supreme Court

(208) 384-2210

451 W. STATE STREET
BOISE, IDAHO 83720

June 14, 1977

Mr. Bruce O. Robinson
Attorney at Law
P. O. Box 8
Nampa, Idaho 83651

Re: S. C. #12224
State v. Creech

Dear Bruce:

Enclosed please find a copy of the letter from Thomas Creech to the Chief Justice and a copy of my answer to him.

Best personal regards, sincerely,

R. H. Young
Clerk

RHY:mah
Enc.

Thomas E. Creech-14984

Box. 7309

Boise, Idaho-83707

June 10, 1977

Chief Justice

Idaho Supreme Court

451 W. State Street

Boise, Idaho-83705

Your Honor,

My appeal; case N^o 12224, was heard before your court on May 5, 1977, and to the best of my knowledge there has been no decision rendered on that hearing, which is the reason for my writing to you.

I am both aware of and sympathetic towards your extremely heavy case load and the resulting delay in your ability to render decisions on the cases heard. I would not trouble you were it not for the extraordinary circumstances which surround my immediate situation.

You may or may not be aware that Oregon & California have filed detainers on me for charges of 1st degree murder allegedly to have taken place during the month of August, 1974. In the advent of my having to stand trial on these charges I view the undeniable attritional effect of the long interim of passing time on evidence and testimony to be definitely and seriously detrimental to my ultimate defense on these charges. I have written to the respective Prosecuting Attorneys in both Ore. & Calif. requesting that I be availed of my right to counsel on these charges for the expressed purpose of protecting myself from the afore mentioned loss of critical evidence and

testimony imperative to my defense. My requests were denied under the claim that I had no Constitutional rights to be appointed legal counsel until I was under the respective jurisdiction of the state filing the charge.

It is with respect to this grievously detrimental situation that I petition your Honor for all possible expediency in the rendering of a decision on my appeal. Should it become necessary; with respect to the expediting the appeal decision, I am prepared to sign extradition waivers to Ore. & Calif.

Thank you for your time and attention in this matter. Until I receive your reply I remain,

Respectfully yours,
Thomas E. Creech #14984

c/c to Idaho Attorney General

c/c to Bruce A. Robinson

c/c file

State of Idaho
Supreme Court

(208) 384-2210

451 W. STATE STREET
BOISE, IDAHO 83720

COPY

May 25, 1977

Mr. Thomas E. Creech
P. O. Box 7309
Boise, Idaho 83707

Re: S. C. #12224
State v. Creech

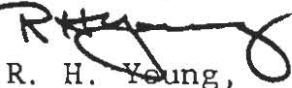
Dear Mr. Creech:

Your letter of May 23, 1977, was received in this office this morning.

Regarding your inquiry as to when the Court will decide on your case, I can not tell you, only to say that your case is one of those that having been orally argued is still under consideration by the Court pending a written opinion.

Our office has only forty-eight hours advance notice as to when an opinion will be released, as the five Justices confer together and reach the agreement on the written opinions.

Sincerely yours,



R. H. Young,
Clerk

RHY:mah
cc: Bruce O. Robinson



DISTRIBUTED

12224 ✓

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

May 13, 1977

WAYNE L. KIDWELL
ATTORNEY GENERAL

TELEPHONE
(208) 384-2400

Mr. R. H. Young, Clerk
Idaho Supreme Court
STATEHOUSE MAIL

Dear Sir:

During oral argument in the case of State v. Creech, No. 12224, Appellant's counsel argued that the Idaho capital sentencing procedure should be considered cruel and unusual as a matter of State constitutional law. Inasmuch as this argument was not made in Appellant's brief, the Court asked if the State desired to respond in writing. The Court also asked for current information on the case of Dobbert v. Florida.

We are pleased to submit the following for consideration in connection with State v. Creech and State v. Lindquist, No. 12218:

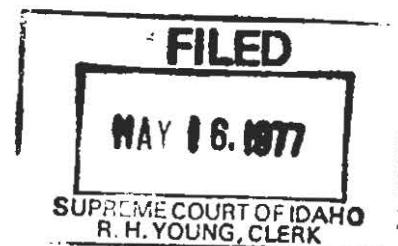
The State does not wish to make any written response to Appellant Creech's argument relating to the State Constitution. We feel that the grounds upon which the United States Supreme Court relied in Gregg v. Georgia, ___ L.Ed.2d, for finding that the death penalty is not, per se, cruel and unusual punishment are persuasive and the State stands on that argument.

Dobbert v. Florida, U.S.S.Ct., 76-5306, was argued in the United States Supreme Court on March 28, 1977, 45 L.W. 3666, but does not appear to have been decided. One of the questions presented for review was:

"Does imposition of death penalty pursuant to Florida statute passed subsequent to date of alleged offense for which defendant was convicted violate constitutional law on ex post facto laws and deny him equal protection of law?" 20 Criminal Law Rptr. 4073.

We also wish to call the Court's attention to Gardner v. Florida, U.S.S.Ct., 74-6593, March 22, 1977, 45 L.W. 4275, in which the Court alludes to the procedural nature of the sentencing

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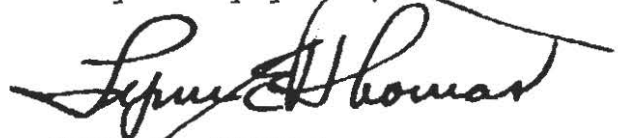
process and the ability of courts to cure sentencing deficiencies. Petitioner was sentenced to death, partly on the basis of a presentence report containing confidential materials not revealed to Defendant's counsel.

" . . . Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. [citation omitted]
The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. . . 45 L.W. 4277 [emphasis added]

Petitioner's conviction, of course, is not tainted by the error in sentencing procedure. The State argues that we should merely remand the case to the Florida Supreme Court with directions to have the entire presentence report made a part of the record to enable that court to complete its reviewing function. That procedure, however, could not fully correct the error. For it is possible that full disclosure, followed by explanation or argument by defense counsel would have caused the trial judge to accept the jury's advisory verdict. Accordingly, the death sentence is vacated and the case is remanded to the Florida Supreme Court with directions to order further proceedings at the trial court level not inconsistent with this opinion." 45 L.W. 4278-4279.

The case of State v. Brown, No. 11719, decided by the Idaho Supreme Court on March 4, 1977, also confirms the power of the trial court to correct sentencing errors at a new sentence hearing.

Very truly yours,



Lynn E. Thomas,
Deputy Attorney General
Criminal Justice Division

LET:lb

cc: Bruce O. Robinson
Allen V. Bowles

03-0

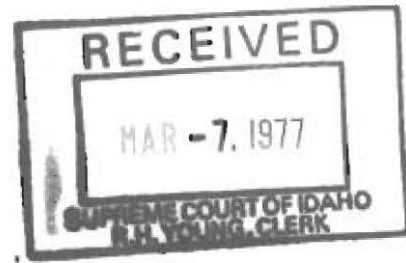
ROBINSON & JONES, P.A.
ATTORNEYS AT LAW

BRUCE O. ROBINSON
ROBERT L. JONES
ASSOCIATE:
GARY H. LEW

PHONE (208) 466-9284
P. O. BOX 8
1320 12TH AVE. SO.
NAMPA, IDAHO 83651

March 4, 1977

R. H. Young, Clerk
Idaho Supreme Court
451 W. State
Boise, Idaho 83720



Re: Thomas Eugene Creech
S.Ct #12224

Dear Bill:

Following our conversation I have checked my calendar for the oral hearing before the Supreme Court during the first week of May in the above-entitled action in Coeur D'Alene.

It would be my preference if this matter would be set either in the A.M. or P.M. of May 5, 1977. I will be attending the Idaho Trial Lawyers Association Seminar which takes place May 6th and 7th in Coeur D'Alene, Idaho.

I am, by copy of this letter, advising Mr. Lynn Thomas and Mr. Bob Remaklus of this preference of time and date and ask that they immediately advise you if this is satisfactory with their schedules and that they have no objections to its being set on that day.

Please advise.

Sincerely yours,

Bruce O. Robinson

BOR:st
CC: Lynn Thomas, Esq.
Robert Remaklus, Esq.

State of Idaho
Supreme Court

(208) 384-2210

March 22, 1977

Ms. Victoria White
Clerk of the District Court
Box 1049
Wallace, Idaho 83873

Attn: Ms. Verda McCoy
Deputy Clerk

Re: Supreme Court No. 12224
STATE v. CREECH

Dear Ms. White:

Enclosed is a copy of the front page of the Clerk's Transcript in the above entitled case. Two volumes of the Clerk's Transcript were filed with the Court on March 7, 1977.

We had previously indicated to you that Exhibit No. 64 was not received by this Court. In review of the Clerk's Transcript we note on Page 389 that Exhibit No. 64 was withdrawn and returned.

Also Pages 73 and 327 are not legible, however, after contacting your office as well as the offices of the appellant and respondent and Judge Durtschi we have been unable to obtain copies that are more legible, therefore, we are making notation to that effect on these pages in the Transcript.

Sincerely,

R. H. Young
Clerk

RHY:mb
Enclosure:
cc: Counsel of record

COPY

R. H. YOUNG
Clerk of the Supreme Court

State of Idaho
Supreme Court

(208) 384-2210

1222
451 W. STATE STREET
BOISE, IDAHO 83720

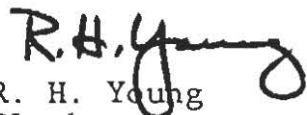
February 15, 1977

Mr. Thomas E. Creech
c/o Idaho State Penitentiary
Building Mail

Dear Mr. Creech:

Your letter of January 26, 1977 has been received and has been placed in your case file. You will be notified when any further action is taken with regard to the subject matter of your letter.

Sincerely yours,


R. H. Young
Clerk

RHY:jc

COPY

JAN 31 1977

Thomas E. Crecch-14984

Box 7309

Boise, Id. 83707

Jan. 26, 1977

R. H. Young, Clerk,
Idaho Supreme Court
451 W. State St.,
Boise, Id. 83720

Supreme Court No. 12224

Dear Sir,

I am addressing this letter to you because I know not who else to turn to in seeking legal assistance and advice. My current situation is a result of my present lawyer, Bruce O. Robinson's repeated refusal to help me, he has not answered the many letters I have written him nor will he accept phone calls from me which must be made collect due to prison policy.

In June of 1975, Mr. Robinson agreed to represent me in the 1st degree murder charges against me here in Idaho. Upon taking over my defense Mr. Robinson received ^{book rights} from me as a retainer; in addition to which he required that I sign a contract with him giving him 60% of all royalties I may receive in the future from my book rights and from books being written on my life story by independent authors. He told me this contract was to be an additional part of his fee for representing me but by my signing it I would also be guaranteed that I would not be found guilty of the charges of 1st degree murder. I have lately been advised that such an agreement for payment of fees is viewed by the American Bar Assoc. as being unethical and I now can fully understand why it is so

viewed, because Mr. Robinson has been interested from the start only in creating publicity surrounding me in order to enhance the amounts of potential royalties and subsequently my defense on the murder charge suffered immeasurable damage.

Mr. Robinson has gone so far in his quest for publicity to even divulge confidential information about me to a writer who wrote an extremely damaging article about me which was published in the February edition of O.U.I. magazine, a nationally distributed publication, and this was by no means an isolated incident as there have been similar articles published without my consent or knowledge in Time Magazine and National Enquirer news paper. Mr. Robinson received considerable monetary remuneration from these stories of which monies I have not received one cent, yet Mr. Robinson claims I still owe him \$36,000.00 for services rendered.

Since my trial there has developed a great deal of animosity between myself and Bruce Robinson and in light of that open animosity I have made repeated requests to my trial judge J. Ray Durtchi to be allowed to dismiss Bruce Robinson and obtain another attorney to represent me in my appeal of my conviction of 1st degree murder, all these requests have been summarily denied by Judge Durtchi which has brought me to ~~me~~ my immediate and grievous dilemma. Therefore I am asking the Idaho Supreme Court to grant me a hearing on the issue of my being allowed to obtain new counsel.

Due to the above mentioned animosity which exists between Mr. Robinson and myself I must ask that Mr. Robinson not be sent a copy of this letter for obvious reasons.

If at all possible, I would greatly appreciate it if a representative of the court could come out here to the prison

so I could further explain my situation and hopefully he could advise me as to what course I should follow in seeking relief in this matter, because as it now stands I am literally without access to legal aid or counsel.

Thank you for your time and attention in this matter.

Respectfully yours,
Thomas E. Cruik

file

ORIGINAL
ROBINSON & JONES, P.A.
ATTORNEYS AT LAW

BRUCE O. ROBINSON
ROBERT L. JONES
ASSOCIATE
GARY H. LEW

PHONE 208-466-9284
P. O. BOX 8
1320 12TH AVE. SO.
NAMPA, IDAHO 83651

December 10, 1976

Mr. Thomas E. Creech
& Idaho State Penitentiary
Box 7309
Boise, Idaho 83707

Supreme Court No. 12224

Dear Tom:

R. H. Young, Clerk of the Supreme Court sent me your letters addressed to them for me to reply to.

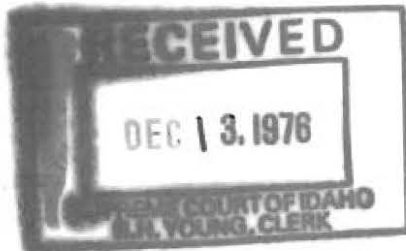
The Brief in your case is now at the printers and should be filed with the Supreme Court before January 1, 1977. The State has 30 days, or more if granted an extension, to respond to my Brief. I will then have an opportunity to do a response to whatever Brief they file.

I would anticipate that your case will probably be set for hearing sometime in March or April. The hearing in the Lindquist case probably will be held before yours. The U. S. Supreme Court decision did not automatically declare the Idaho statute on the death penalty unconstitutional. That is the reason why both your case and the Lindquist case are being appealed to the Idaho Supreme Court.

There is no motion that I am aware of that could be made to remove you from the isolation you are presently confined in. That will not be accomplished until the Supreme Court has heard your case fully.

If you have any further inquiry, please write to me directly, with copies, if you wish, to the Supreme Court, or to shomever you desire to send them to.

All of the questions that you asked in your letter, I have answered on the several visits that I have made to the penitentiary. As you can see, there are no answers that are different that what I previously advised you.



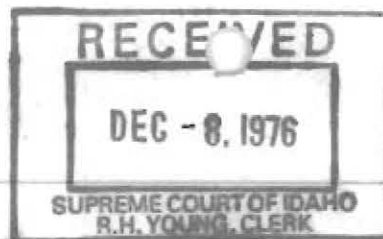
Sincerely yours,


Bruce O. Robinson

BOR:st

CC: R. H. Young, Clerk, Supreme Court

Supreme Court No. 12224



Monday
Dec. 6, 1976

Dear Sir,

I'm writing to you in regards to my appeal. I would like to know when my case will come before the Idaho Supreme court? I'd also like to know if there is some kind of motion that I could file that would take me off death row?

I was under the impression that when the U.S. Supreme court made their ruling in July, that they declared the death penalty in Idaho, unconstitutional. Am I correct in that respect? If so, shouldn't I be placed in the regular population here at the prison, and taken off death row?

I hate to bother you with all this, but I was told to write and ask you about these matters. I'd appreciate it very much if you can answer this letter as soon as possible.

Thank you,
Respectfully,

Thomas E. Church (14984)

C.C. File:

Ralph Perice - Cozenshor - T.S.P.

Personal File -

Clerk - Supreme Court of Idaho

DATE: Dec. 6, 1976

R. H. YOUNG
Clerk of the Supreme Court

State of Idaho
Supreme Court

(208) 384-2210

451 W. STATE STREET
BOISE, IDAHO 83720

June 28, 1976

Mr. Thomas E. Creech
P.O. Box 7309
Boise, Idaho

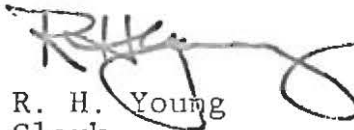
COPIED

Dear Mr. Creech:

Your letter of June 22, 1976 addressed to the Chief Justice (and erroneously addressed to 550 W. Fort Street, which is the address for the U. S. District Court-attached) has been received today by the Chief Justice and referred to me for answering. This is to let you know that on Friday, June 25, 1976, the Court denied the State's application for your transfer and copies have been sent to your counsel of record, Bruce O. Robinson, and the Idaho Attorney General's Office.

Any further business you may have with the Court should be addressed to R. H. Young, Clerk, at 451 W. State Street, Boise 83720.

Sincerely,


R. H. Young
Clerk

RHY:jc
Att.

JUN 28 1976

THOMAS E. CREECH (14984)

P.O. ~~7309~~ 7309

NATIONAL ID# 00151

PHONE 466-9284

"FREEDOM"



M. C.

DAYTON, OHIO

✕ CHUBASCO ✕

NATIONAL PRESIDENT

"22"

6-21-76

Dear Sir,

I am writing this letter in regards to the motion filed on June 2, 1976, for my temporary transfer. Supreme Court No. - (12224) I was not aware of this motion being filed until a week after it was filed. I understand under the constitution I have a right to due process and equal protection. I think this right has been violated, by not letting me be present at this motion, to act in my defense to argue this motion. Also I wasn't even represented by an attorney on my behalf. So, I ask that this motion be dismissed. My attorney Bruce O. Robinson, filed with the courts of the state asking for me, a request for fair & speedy trial in June, 1975. I was made available to them for trial but they never responded. (Therefore, I asked to have these charges disposed of. Because of violating my right to a fair & speedy trial. This request was made to Ronald Bruce who filed the motion in your court.) If any further hearings are to be had, I'd like to be present & represent myself, and be appointed counsel as my legal assistant and advisor. Please advise me of what the situation is at this time.

Thank you,
Respectfully,

Thomas E. Creech (14984)

FIRST JUDICIAL DISTRICT -- STATE OF IDAHO

P. O. BOX 527
WALLACE, IDAHO
83873

JAMES G. TOWLES
DISTRICT JUDGE
RESIDENT CHAMBERS:
SHOSHONE COUNTY COURTHOUSE

VANCE GARRETT
ERENE VERMILLION
COURT REPORTER

April 19, 1976

Honorable J. Ray Durtschi
District Judge
Ada County Courthouse
Boise, Idaho 83702

RE: State of Idaho vs. Thomas Eugene Creech
Valley County Case No. 2165
Shoshone County Case No. 9701

Dear Judge Durtschi:

Mrs. Lindley, our deputy clerk of the court has requested my help in ascertaining her duties in perfecting the appeal in the above action and I believe she needs some direction from you.

You will recall that the case was transferred on change of venue from Valley County to Shoshone County and it's my understanding at that point it became a Shoshone County case. However, once the trial was concluded and the court returned to southern Idaho the documents filed carry the designation and the heading as if the case was still in Valley County. Copies of the papers were forwarded to the clerk here for filing but were not certified as required by the rules and statutes. The Notice of Appeal that reached the clerk's office here was filed in Valley County on January 22nd and forwarded here and filed on January 26th. However, the Judgment of the Conviction was not filed in Valley County until March 25th and in Shoshone County March 31st. The praecipe of the defendant requests the Clerk of Valley County to prepare the Transcript on Appeal and a new Notice of Appeal was filed in Valley County April 1st, and an uncertified copy forwarded here and filed April 8th. All of the appeal papers refer to the Clerk of Valley County.

It would appear to me that the venue of the case is still in Shoshone County and that any transcript would have to be prepared by the clerk here, unless the venue was re-transferred to Valley County.

SUPREME COURT OF IDAHO

RECEIVED

APR 20 1976

R. H. YOUNG, Clerk

FIRST JUDICIAL DISTRICT -- STATE OF IDAHO

P. O. BOX 527

WALLACE, IDAHO

83873

JAMES G. TOWLES
DISTRICT JUDGE
RESIDENT CHAMBERS:
SHOSHONE COUNTY COURTHOUSE

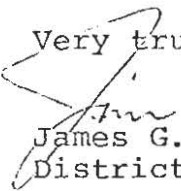
VANCE GARRETT
~~THOMAS VERMILION~~
COURT REPORTER

However, as I previously stated, most of the pleadings and papers filed since the time of the trial are merely copies and were not certified by the clerk of the court in Valley County. It is my feeling that the originals should have been filed here once the venue had been changed and that no further papers would have been filed in Valley County. It is somewhat difficult for the clerk here to prepare the transcript when she does not have the original documents, or at least certified copies thereof.

Would it be possible for you to ascertain what can be done to untangle this confusion as it is my understanding that you are still presiding and would be in a much better position to instruct the clerks involved what should be done.

Best personal regards.

Very truly yours,


James G. Towles,
District Judge

JGT:vg

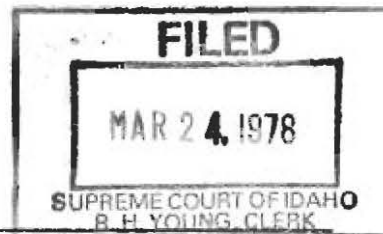
cc: * Mr. R. H. Young
Mr. Bruce O. Robinson
Mr. Robert H. Remaklus
Ms. Margret Lindley
Mr. J. W. Crutcher

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO,
Plaintiff-Respondent,
-vs-
THOMAS EUGENE CREECH,
Defendant-Appellant.

Supreme Court #12224



APPELLANT'S RESPONSE TO RESPONDENT'S BRIEF IN
OPPOSITION TO PETITION FOR REHEARING

Appeal from the District Court of the First Judicial District of
the State of Idaho, in and for the County of Shoshone

HONORABLE J. RAY DURTSCHI
District Judge

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IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	
)	
-vs-)	Supreme Court #12224
)	
THOMAS EUGENE CREECH,)	
)	
Defendant-Appellant.)	
)	
)	

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Appeal from the District Court of the First Judicial District of
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ARGUMENT

Introduction

Before the Defendant-Appellant, Thomas Eugene Creech, makes his response to the State's Brief in Opposition to the Petition for Rehearing, a brief review of the history of this case is in order.

Following trial, the Defendant-Appellant was convicted of two alleged killings that took place November 4, 1974. Pursuant to I.C. §18-4004, Chap. 68 §1, 1911 Sess. Laws; (Repealed, 1971); (Re-enacted, 1972); (Codified as I.C. §18-4004), amended Chap. 276 §2, 1973 Idaho Sess. Laws, p. 588, the Defendant-Appellant was sentenced to death under the mandatory death provision law in effect at the time of the alleged murders.

In a decision handed down October 20, 1977, State vs. Creech, No. 12224, the death sentence was vacated although the sentence of conviction was upheld. The Defendant-Appellant was remanded for resentencing.

In its opinion, the majority pointed out that the Idaho mandatory death penalty statute was almost identical to that struck down by the United States Supreme Court, Woodson vs.

North Carolina, 428 U.S. 280, 49 L.Ed.2d 974, 96 S.Ct. 2978 (1976). The Idaho court held that the 1973 amendment, which called for a mandatory death sentence against one convicted of first degree murder was unconstitutional and, therefore, "void and ineffective for any purpose". (State vs. Creech, slip opinion, p.2) The court added these words:

"There is nothing to indicate that the legislature would have refused to retain the prior penalty statute without the 1973 amendment. Thus, the former statute remains in effect as if the amendment had never been attempted." (State vs. Creech, slip opinion, p. 2-3)

The court added that the death penalty could be inflicted if sentencing standards existed to guide the sentencing authority in determining whether the death penalty should be imposed.

The Defendant-Appellant petitioned for rehearing and it was granted December 21, 1977. This response by the Defendant-Appellant is directed at the arguments presented by the State in its Brief of Opposition. The Defendant-Appellant has not abandoned any of his prior arguments and continues to maintain that they are valid propositions for the holding that the death penalty cannot be imposed upon him. It should also be noted at this time that the State's brief argues material and contentions that the Defendant-

Appellant, Creech, did not use in his earlier appeals. Since the State has apparently directed these new responses at the Defendant-Appellant, Creech, apparently filing one brief against the Defendant-Appellant, Creech, and a party similarly situated, Mr. Lindquist, this response will also direct itself at this new material.

Any attempt to resentence the Defendant-Appellant to death is a violation of the ex post facto clauses of the United States and Idaho Constitutions

It is heartening to see that the State has taken the wise position that a party does have the right to have ameliorative changes applied retroactively to him without any violation of the ex post facto clauses of the United States and Idaho Constitution. The majority of the Idaho Supreme Court in State vs. Creech had argued that ameliorative changes could not be applied retroactively if the Defendant-Appellant's argument was accepted that he had a right to be tried, convicted and sentenced under the law in force at the time of the commission of his offense.

The State, in its brief, has cited Calder vs. Bull, 3 Wall, 386, 1 L.Ed. 648 (1798), correctly noting that an ex post facto law is one which modifies the rigor of criminal law. The State failed to mention that in Calder

vs. Bull, supra, an ex post facto law is one that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.

The State also cited Massingill et. al. vs. Downs, 7 How. 760, 12 L.Ed. 903 (1849), which held that retrospective laws cannot change the rights and liabilities of parties which have been established by a judgment. The State failed to qualify Massingill, supra, in that it did not point out that the case involved a civil suit. Involved was the validity of a lien which a subsequent law allegedly invalidated. Any discussion of ex post facto laws is premised on the doctrine that ex post facto laws are only those involving criminal or penal statutes and their application, Calder vs. Bull, supra. There are many examples, too numerous to mention, of non-penal or non-criminal laws effecting rights being applied retroactively. Therefore, any case involving a civil rather than a criminal or a penal statute is distinguishable for purposes of ex post facto analysis.

On page 3 of their brief, the State cites Beazell vs. Ohio, 269 U.S. 167, 70 L.Ed. 216, 46 S.Ct. 68 (1925), which points out an ex post facto law includes one ". . . which makes more burdensome the punishment for a crime

after its commission. . ." Then the State blandly assures the court that nothing in the present case falls within the boundaries of that well-established definition of an ex post facto law. The Defendant-Appellant disagrees.

However, the State failed to comment on the following cases and arguments by the Defendant-Appellant. In Fletcher vs. Peck, 6 Cranch 87, 3 L.Ed. 162 (1810), it was held that an ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed. The State failed to address itself to this case and similar ones. Black's Law Dictionary, (1968), defines manner as a "way, mode, method of doing anything, or mode of proceeding in any case or situation". At the time of the commission of his alleged offense, the way, mode, or method of inflicting the death penalty upon the Defendant-Appellant was not constitutionally permissible. As the majority of the Idaho court pointed out in State vs. Creech, supra, the relevant section of Idaho Code §18-4004 was void and ineffective for any purpose. Therefore, the death penalty as a remedy or punishment was not available. Since the State ignored this contention by the Defendant-Appellant, he can only assume they accepted it. Therefore, the death penalty cannot be imposed upon him.

Throughout its ex post facto argument, the State literally stands possessed by the authority of Dobbert vs. Florida, ____ U.S. ____, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977). Dobbert relies heavily upon Chicot County District vs. Bank, 308 U.S. 371, 84 L.Ed. 329, 60 S.Ct. 317 (1940). Chicot involved a civil action, where a void law which otherwise would have denied relief to the prevailing parties, was held to be an operative fact and, therefore, authority to give the eventual prevailing parties relief. An earlier judgment had also been rendered for them in their favor. However, Chicot was qualified by United States vs. Estate of Donnelly, 397 U.S. 286, 90 S.Ct. 1033 (1970), in which the court emphasized the fact that a judgment in favor of the prevailing parties in Chicot had also been rendered and, therefore, that holding was res judicata as to the parties who had claimed that the void statute could not be used by the eventual prevailing parties as a defense. It would seem then that the qualifications placed upon Chicot by Estate of Donnelly require that a party fail to assert that the unconstitutional statute is void. The Defendant-Appellant here has never failed to assert that the statute under which he was sentenced was unconstitutional and void.

Although Dobbert, supra, uses the operative fact and fair warning doctrines as grounds for upholding the use of an unconstitutional death penalty to support the application of a constitutional death penalty; the Defendant-Appellant maintains that the reasoning used in the majority's opinion in Dobbert is tenuous at best. One cannot escape the fact that an unconstitutional law is being used as the basis to sentence a man to death. It is unfortunate that a void law must be the source of a State's claim to take the life of a man.

As Justice Bakes pointed out in his articulate dissent to the majority in State vs. Creech, the death penalty could simply not be imposed at the time of the commission of the offense. The vigorous dissent in Dobbert pointed out the illogic of forcing one to speculate on whether a particular type of punishment could, in the future, be found to be constitutional.

The State maintains the fact that the sentencing standards announced in Woodson vs. North Carolina, supra, were unavailable to the Defendant-Appellant at the time of the commission of his offense, his trial, or his original sentencing is irrelevant. The State fails to acknowledge the language contained in Dobbert at 57 L.Ed. 361. Although

the language of the court was directed at an equal protection claim by Dobbert, the court indicated its holding as to when the new statute could take effect against an accused who had committed an alleged murder before the statute became law. The court noted, speaking of Dobbert:

" . . . He was neither tried nor sentenced prior to Furman, as were they, and the only effect of the former statute was to provide sufficient warning of the gravity Florida attached to first degree murder so as to make the application of this new statute to him consistent with the ex post facto clause of the United States Constitution. Florida obviously had to draw the line at some point between those whose cases which have progressed sufficiently far in the legal process so as to be governed solely by the old statute, with the concomitant unconstitutionality of its death penalty provision and those whose involving acts which could properly be subjected to punishment under the new statute. There is nothing irrational about Florida's decision to relegate petitioner to the latter class, since the new statute was in effect at the time of his trial and sentence."

Noting too that criminal statutes are to be interpreted strictly against the State and liberally in favor of the accused, Donnelly vs. United States, 276 U.S. 505, 72 L.Ed. 676, 48 S.Ct. 50; the majority of the Supreme Court in Dobbert has indicated that the death penalty can only be applied to those who had the benefit of the sentencing standards available to them at trial and sentencing. It is a well-known axiom of statutory construction that criminal

statutes are to be construed strictly, Federal Maritime Com. vs. Seatrain Lines, Inc., 411 U.S. 726, 36 L.Ed.2d 620, 93 S.Ct. 1773; Independent School Dist. No. 5 vs. Collins, 15 Ida. 535, 98 P. 857 (1908); and numerous others. Therefore, since the Defendant-Appellant did not have the benefit of the sentencing standards available to him at the original trial and sentencing and since criminal statutes are strictly construed, he should be given the benefit of the doubt, particularly considering that the legislature of Idaho has since adopted a constitutional death penalty sentencing process.

The State cites Carter vs. Illinois, 329 U.S. 173, 91 L.Ed. 173 (1946), noting that the constitution commands the states to assure fair judgment and observe the ultimate dignities of man. The Defendant-Appellant suggests that there is nothing assuring a fair judgment when one is being sentenced to death on the basis of a void statute. The Defendant-Appellant maintains that it is undignified for a State to assert it has the power to execute a man based upon a void law and that any such attempt is, at best, an act of judicial acrobatics.

Curiously, the State, in its brief, (page 9) asserts that the death penalty has never fallen as a matter of Idaho

law. The Idaho Supreme Court in its majority opinion in State vs. Creech pointed out that the statute under which the Defendant-Appellant was sentenced is void and without any effect. Therefore, the basis under which the Defendant-Appellant was sentenced did not exist. If the death penalty statute in effect at the time of a sentencing is declared invalid, how can it be said that the death penalty "has not fallen"?

Despite the claims of the State to the contrary, the Defendant-Appellant maintains that White vs. Brown, 468 F.2d 301 (9th Cir., 1972), remains good law. White simply said that once a death penalty statute is invalidated, a person cannot be resentenced to death since this would expose him to a greater punishment than existed at the time of the commission of his offense.

The Defendant-Appellant maintains that his conclusions about In Re Davis, 6 Ida. 766, 59 P. 544 (1898), are correct. The Defendant-Appellant points out the following language at 6 Ida. 766, 771-772:

" . . . A person who has been convicted of an offense must be punished under the law as it existed at the time of the commission of the offense, though the act prescribing the punishment has since been repealed by an amendment which increases the punishment. . ."

" . . . The amendments as made by said act, do not apply to convictions for offenses committed before their enactment, and are not applicable to past offenses and are prospective only in their operation."

Since this conclusion was reaffirmed in State vs. Garde, 69 Ida. 209, 205 P.2d 504 (1949) and State vs. Eikelberger, 71 Ida. 282, 230 P.2d 696 (1951), the Defendant-Appellant maintains that he has a right to be sentenced under the substantive law in effect (imperfect or not) that did not have a legally enforceable death penalty provision.

The State has made reference to Davis vs. Burke, 179 U.S. 399, 45 L.Ed. 249 (1900), arguing that the ex post facto issue was not resolved in Davis' favor. Although the court upheld the execution order, Justice Brown at 179 U.S. 404, noted that the death penalty should be carried out in accordance with the law as it stood at the time of the commission of the offense, the trial and original sentence.

Because of their obvious decisive effect upon its argument, the State has attempted to dismiss in one sentence the powerful effect of Akins vs. State, 202 S.E.2d 62 (Ga.) 1973; Upton vs. Graves, 509 S.W.2d 823 (Ark.) 1973; and Commonwealth vs. Harrington, 323 N.E.2d 825 (Mass.) 1974. The first two stand for the rule that a

death penalty statute believed to be constitutional cannot be imposed upon individuals convicted under an unconstitutional death penalty statute. Commonwealth, supra, held that an unforeseeable judicial decision attempting to implement an allegedly constitutional death penalty statute is also barred by the ex post facto clause.

Perhaps suggesting that because the Defendant-Appellant has been convicted of murder that he has no rights, the State has claimed in its brief that the Defendant-Appellant has failed to identify any substantive right which was taken away (State brief; page 13). The Defendant-Appellant wishes to remind the State that he has a right to life, both under the Fourteenth Amendment of the United States Constitution and the Idaho Constitution, Article 1: Section 1, Section 13. The Defendant-Appellant is not under any sentence of death at this time. Therefore, he has a right to life, which the State is attempting to take away from him by the application of an ex post facto law. Gregg vs. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976), states that the death penalty shall not be arbitrarily and capriciously imposed and it shall not be imposed haphazardly on persons similarly situated. Obviously, when Mr. Creech, out of all the persons sentenced to death in any state

under mandatory death penalty statutes is being once again exposed to the penalty of death, it cannot be said that he is facing this ultimate penalty as other parties similarly situated did.

Furthermore, as the Defendant-Appellant pointed out in his original appeal, other defendants charged with first degree murder in Idaho, in their trials had the penalty provisions modified to exclude their death penalty (see Defendant-Appellant's response, pages 3-4 and exhibits). Obviously, in being exposed to the death penalty, he is being subject to a haphazard approach by the State contrary to Gregg vs. Georgia, supra. The State has ignored this argument; the Defendant-Appellant can only assume it accepts it.

The Defendant-Appellant does not, as the State claims, maintain he has a right to be wrongly sentenced. Citing Bozza vs. United States, 330 U.S. 160, 91 L.Ed. 818, 67 S.Ct. 645 (1947), the State has twisted the argument presented by the Defendant-Appellant. Rather, the Defendant-Appellant maintains he has a right to be sentenced to the law in force and constitutionally valid at the time of the commission of his offense, which did not include the death penalty. As Bozza, supra, suggests at 330 U.S. 166, a

sentence, even if erroneous, cannot be modified when it would increase a defendant's punishment unlawfully. This is precisely what the State is attempting to do.

Again confusing the differences between retrospective civil laws and criminal laws having an ex post facto effect, the State has cited Freeborn vs. Smith, 2 Wall. 160, 17 L.Ed. 922 (1865). The action involved here was a civil suit between two members of a partnership. The Defendant-Appellant has already pointed out the ex post facto clause applies to penal and criminal laws only. The Defendant-Appellant admits that courts traditionally have allowed the use of retrospective laws involving civil remedies much more liberally than they have allowed the use of criminal laws tending to have an ex post facto effect. Therefore, Freeborn, supra, is clearly distinguishable and its conclusions are only collaterally informative, at best. The State also seems to be saying it is the Defendant-Appellant's fault that he was sentenced under an unconstitutional law. The Defendant-Appellant was subject to the law as it was finally construed by the courts. The fact that the legislature enacted an unconstitutional law is not the Defendant-Appellant's fault. The State must take the laws as they are passed by the legislature and

construed by the courts. The ex post facto clause was intended to prevent harsh and oppressive laws. It was designed to prevent legislatures, in their subsequent wisdom, from enacting laws that apply harsher penalties against defendants subject to prior punishment. Judicial construction having the same effect is forbidden by Bouie vs. City of Columbia, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1969).

The State has made the claim that one acquires no vested rights in procedural errors, however, as the Defendant-Appellant has pointed out in his original Petition for Rehearing, citing Kring vs. Missouri, 107 U.S. 221, 20 L.Ed. 507 (1882), and numerous other cases, merely claiming that a subsequent change in the law is procedural and that it has not deprived a party of any rights is inadequate for purposes of ex post facto analysis.

Rather, it is a question of the impact of the procedural changes upon the Defendant's status and rights. Subsequent procedural laws which applied retrospectively where they have a harsh and oppressive result are prohibited by the ex post facto clause, Kring, supra. Certainly the imposition of the death penalty is a harsh and oppressive law, which the State is attempting to suggest is possible.

Subsequent laws, when applied retrospectively, which alter the situation of the Defendant to his disadvantage are barred by the ex post facto clause, U.S. vs. Hall, 2 Wash. 366. Where a subsequent law which deprives a Defendant of his substantive rights by retrospective application, the ex post facto clause acts to nullify the operation of that law retrospectively, Thompson vs. Utah, 170 U.S. 343, 42 L.Ed. 1061, 18 S.Ct. 620 (1898). The Defendant-Appellant maintains he may be being deprived of the right to life.

The State says whether the retroactive application of rules of law violate due process depends on whether there was fair warning given to the Defendant. The Defendant-Appellant does not accept this analysis of the operation of the ex post facto clause. It is elementary to point out that the ex post facto clause was enacted long before the Fourteenth Amendment. The rights protected by the ex post facto clause were in existence long before the enactment of the Fourteenth Amendment and the due process protections. Hence, a due process analysis of the ex post facto clause is inadequate. The ex post facto clause was intended to secure substantial personal rights against hostile and oppressive retrospective legislation, Calder vs. Bull, supra.

Justice Stevens, in his dissent in Dobbert, pointed out the inadequacy of the fair warning analysis:

" . . . but it is not words in statute books that construe the law. If citizens are bound to know the law 'they (are) bound to know it as we have expounded it' Kring v. Missouri, 107 U.S. 235, 27 L.Ed. 506, 2 S.Ct. 443. A consistent application of that presumption which require the conclusion that neither the lawyer or their itinerant had fair warning because both must also be presumed to know that the old Florida statute was a nullity. The Court's test cannot fairly be applied on the basis of a particular individual's actual knowledge of the law; if applied on the basis of a presumed knowledge of the law, it requires reversal of this conviction."

Furthermore, Bouie, supra, in enunciating the fair warning test, pointed out that at 378 U.S. 354:

" . . . the fundamental principal that the required criminal law must have existed when the conduct in issue occurred, Hall General Principals of Law (2d Ed., 1960, at 58-59) must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue', it must not be given retroactive effect. Id., at 61."

AUTHORITY TO RESENTENCE

The State has challenged the argument of Justices Bakes and Bistline that a conviction of second degree murder necessarily implies a conviction of first degree murder. As is pointed out in one of the latest Louisiana cases on

the subject involving the application of a second degree murder penalty against one convicted of first degree murder, State vs. Brooks, (La.), 351 So.2d 1197, (November 14) 1977, that penalty is imposed as it is the most severe penalty established by the legislature for criminal homicide at the time of the offense which the court could presume to be constitutional. Louisiana has also followed this approach in two subsequent decisions rendered after Dobbert; State vs. Smith, 351 So.2d 1191 (1977); and State vs. Sheppard, 350 So.2d 615 (1977).

The State has argued that a finding of first degree murder necessarily implies a finding of premeditation. The Defendant-Appellant will agree with this in a qualified sense. However, under Idaho statute, I.C. §18-4003, first degree murder also includes any murder committed in perpetration or the attempt to perpetrate arson, rape, robbery, burglary, kidnapping or mayhem. Hence, premeditation is not an essential element for a finding of first degree murder. It is also apparent in I.C. §18-4003(g) that the legislature commands that all other murders are of the second degree does not exclude murders involving premeditation but only those premeditated murders of a specially heinous nature.

Certainly, the State would argue that a death that resulted during an aircraft hijacking or a forcible act of sodomy would also be included in the defense of first degree murder.

Use of the second degree murder penalty doctrine obviously was applied because courts did not wish to set convicted murderers free who had been convicted and sentenced under a void law. The State makes reference to an argument that a lesser included offense conviction would mean conviction of all of the lesser included elements of second degree murder. It is sufficient to say that the well-established judicial doctrine of merger renders this argument by the State ineffective.

The State has argued that because the various courts did not apply the standards of Gregg vs. Georgia when confronted with defendants who were convicted under a mandatory death penalty sentencing scheme that the holdings in State vs. Jenkins, 340 So.2d 157 (La. 1976); United States vs. Johnson, 425 F.Supp. 986 (E.D.La. 1976); Blackwell vs. State, 365 A.2d 545 (Md. 1976); State vs. Duren, 547 S.E.2d 476 (Mo. 1976); Smith vs. State, 560 P.2d 158 (Nev. 1977); State vs. Rondeau, 553 P.2d 688 (N.M. 1976);

People vs. Velez, 388 N.Y.S.2d 519 (N.Y.Sup.Ct. 1976);
State vs. Warren, 232 S.E.2d 419 (N.C. 1977); Riggs vs. Branch, 554 P.2d 823 (Okla.Cr.App. 1976); State vs. Rumsey, 226 S.E.2d 894 (S.C. 1976); Calkins vs. State, 550 S.W.2d 643 (Tenn. 1977), are invalid. The Defendant-Appellant suggests that these cases almost without exception recognize that one sentenced under an unconstitutional and void death penalty statute could not be resentenced to death.

As the State has acknowledged, State courts have held that with the invalidity of the mandatory death penalty statute, prior statutes applicable to murder cases were revived by the failure of the mandatory death penalty. This is apparently what the Idaho Supreme Court did in its holdings in State vs. Creech, supra, (slip opinion, p. 2,3). As previously pointed out, the Court noted:

"There is nothing to indicate that the legislature would have refused to retain the prior penalty statute without the 1973 amendment. Thus, the former statute remains in effect as if the amendment had never been attempted."

The Tennessee Supreme Court took a similar approach in Collins vs. State, 550 S.W.2d 643 (1977). See also Rippey vs. State, 550 S.W.2d 636 (1977) and Morgan vs. State, 550 S.W.2d 643 (1977).

Like the Idaho court in Creech, the Tennessee Supreme Court held that the invalidity of the sentencing did not invalidate the statute defining first degree murder or the convictions obtained thereunder. They stated that it had the effect of reviving the law prior to 1973, again like the Idaho court. The Tennessee law prior to 1973 provided for the death penalty, life imprisonment, or a sentence of 20 years as the jury may determine, Williams Tennessee Code An. Section 10-77, T.C.A. 39-2405. The prior 1973 Tennessee statute did not provide for a list of mitigating circumstances as required by Woodson, supra. The Court concluded, therefore, that the prisoners in these cases and others similarly situated be given resentencing hearings that did not include the possibility of death sentences under the earlier Tennessee statutes, 550 S.W.2d 643, 646-647.

This would seem to be a permissive action by the Idaho Supreme Court, since the majority in Creech has enunciated that the pre-1973 death penalty statute is in effect. However, the pre-1973 statute carried a provision that death or life imprisonment would be applied toward the convicted defendant at the discretion of the jury. Present Idaho law provides that the judge after weighing mitigating

and aggravating circumstances following a conviction of first degree murder shall sentence the convicted defendant to death or life imprisonment. The majority in Creech could not mean that the prior 1973 statute giving the jury untrammelled discretion in determining whether to sentence the defendant to death or life imprisonment, would be permitted in the wake of Furman vs. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972).

Obviously, this confusion by the majority indicates their lack of legal justification to sentence the Defendant-Appellant to death. Does the majority in Creech propose that the word "jury" in the pre-1973 death penalty statute be replaced by the word "judge", as contained in the present I.C. §18-4004 and I.C. §19-2515. Clearly, this is not the intent of the legislature, and is an unforeseeable judicial construction.

Since, as the Court pointed out in Furman vs. Georgia, supra, the use of jury discretion in determining whether a life sentence or death sentence would be imposed reflected an abhorrence on the part of juries to necessarily sentence a man to death because he had been charged with first degree murder, it is clear that the majority in Creech

finds themselves involved in a circular argument in supporting the death penalty.

Even the majority in Dobbert, supra, by way of dicta indicated that the death penalty under a pre-Furman statute would be unconstitutional, 53 L.Ed.2d at 361.

RETROSPECTIVE ADOPTION OF RULES

The State has failed to confront the argument presented by Justice Bistline in his dissent that the Court cannot adopt substantive matters as part of its rule-making power under I.C. §1-212. As the Defendant-Appellant pointed out in his Petition for Rehearing, I.C. §1-213, the rule-making power of the court is limited by a restriction that the rules shall neither abridge, enlarge nor modify the substantive rights of any litigant. The State failed to question explicitly whether the rights involved in I.C. §19-2515 were substantive or procedural although they seem to indicate by the language of their response that such rules are procedural.

The State argued that I.C., §73-101 does not apply to the present case. That section indicates that no part of these compiled laws is retroactive unless expressly so declared. The State indicates that the rules adopted by

the court are not an application of I.C. §19-2515. Even a superficial examination of the sentencing standards for first degree murder stated in State vs. Creech would show that they parallel the rules stated in I.C. §19-2515; hence, they are nothing more than that statute disguised as rules, enacted supposedly under the court's inherent rule-making power.

That a court may judicially construe a law in order to incorporate a new effect (constitutionally sentencing one to death) is clearly forbidden by Bouie. In a much earlier case, the Supreme Court flatly rejected any disguised attempt to impose laws which have an ex post facto effect. In Cumming vs. Missouri, 4 Wall. 277, 18 L.Ed. 356 (1866), the court was faced with a Missouri statute whereby an oath was required by those planning to practice law or engage in the ministry. The oath required that the applicant swear he had never born arms or supported any enemy of the United States. The statute was intended to prevent those, who apparently had been of Confederate sympathies or had born arms against the United States if the Civil War, from joining those professions.

The Court struck down the oath pointing out that it

imposed a prohibition based upon prior acts penalized by a subsequent law, thereby running afoul of the ex post facto clause. The court added that if instead of using an oath, the State had merely prohibited by statute, those who had born arms or been in sympathy with the Confederacy from becoming attorneys or ministers, such an act would clearly be prohibited by the ex post facto clause. The court stated that a subterfuge act having the same effect would equally be prohibited:

"The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment its insertion in the fundamental law was a vain and futile proceeding. . ." 71 U.S. 325

". . . Now, as the State, had she attempted the course supposed, would have failed, it must follow that any other mode producing the same result must equally fail. The provision of the Federal Constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end, can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named, against which the framers

of the Constitution intended to guard, which may not be effected." 71 U.S. 329

The indirect methods expressly prohibited by Cummings is what the majority in Creech expounded and the State seeks. The Defendant-Appellant could not be sentenced to death under the law as it existed at the time of the commission of his offense.

LEGISLATIVE INTENT

In order for the death penalty to be constitutionally applied to the Defendant-Appellant, there must exist standards to guide the sentencing authority in its determination of whether to inflict the death penalty or life imprisonment, Gregg vs. Georgia, supra. The State concedes this. The question is whether those standards disguised as court rules can meet the standards of the ex post facto clause. The Defendant-Appellant maintains they cannot. The Defendant-Appellant also maintains that the construction of a statute disguised as rules is impossible without a specific legislative intent. It was noted in 82 C.J.S. 996, §419 - "Statutes Relating to Offenses and Prosecutions":

"Ex post facto construction is as pernicious as ex post facto legislation. Hence, statutes of a criminal or penal nature will not be construed to have a retrospective operation unless the intention of the legislature to give them such language is expressed in clear and unequivocal language."

There is no such language contained in the present Idaho death penalty statutes as amended in 1977. There is no clear and unequivocal language. Rather, there is the barrier of I.C. §73-101, which the State has failed to clear. It has attempted to elude it by supposition and assumption. This does not meet the express declaration standard of I.C. §73-101.

Nor did the State answer the question by the Defendant-Appellant posed to the court (and hence to it) as to why the legislature would have amended the post-Furman statute if it believed that the death penalty could constitutionally be inflicted in Idaho. The legislature has indicated that it intends that the death penalty remain available in the State of Idaho. However, the legislature would not have enacted the amendments to the Idaho death penalty statute in 1977, if it intended or believed that the 1973 Idaho death penalty statute would allow the imposition of the death penalty.

The State and the majority in Creech attempted to sidestep this question by the use of rules that would be applied retroactively to the Defendant-Appellant, obviously an attempt to avoid an ex post facto construction of the present law against the Defendant-Appellant. There

is no evidence submitted by the State of an intent by the Idaho legislature to allow this result. In fact, the evidence indicates that the legislature knew that the death penalty could not be applied without the 1977 amendments to I.C. §18-4004 and I.C. §19-2515, that met the standards announced in Gregg vs. Georgia, supra. In effect, the adoption of those constitutional standards in 1977 by the legislature preempted any opportunity by the court (if it ever existed) to adopt a series of rules making the 1973 or 1972 death penalty statutes constitutional.

Furthermore, there is an imposing list of authority to indicate that such guidelines for sentencing must be enacted by the legislature. In Gregg vs. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976), Justice Stewart in his plurality opinion, stated:

" . . . The concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that insures the sentencing authority is given adequate information and guidance." 428 U.S. 195 (emphasis added)

The state has cited no authority that allows a State court to devise rules to constitutionally sentence one to death and apply them retroactively. Even Dobbert did not go so far. Florida had a valid statute in effect at the time of

the trial and sentencing. Three Supreme Courts of states have been confronted with this question. All have rejected the attempt for the court to impose rules to permit an unconstitutional death penalty statute to be revived so that the death penalty can be constitutionally inflicted; see Rockwell vs. Super. Ct. of Ventura County, (Calif.), 556 P.2d 1101 (1976); French vs. State, (Ind.), 362 N.E. 834 (1977); Kennedy vs. State, (Wyo.), 559 P.2d 1014 (1977); Collins vs. State, (Tenn.) 550 S.W.2d 643 (1977). The New York Court of Appeals, the highest court in that state, by implication, reached much the same result in People vs. Davis, 371 N.E.2d 456 (1977), a case decided after Dobbert, November 15, 1977. The court struck down a mandatory death penalty statute, sentencing the defendants to life imprisonment. It noted that:

" . . . Courts may not substitute their judgment for that of the legislature as to the wisdom and expediency of the (death penalty) legislation." 371 N.E.2d 462

The State has argued the courts have devised sentencing guidelines but nowhere in their brief has the State cited any authority whereupon such death penalty standards can be implemented and created by a court or applied retroactively. Once again, it is important to remember that

in the construction of criminal statutes (including the Eighth Amendment) that the defendant is to be given the benefit of that construction. Legislatures adopt the penalties for substantive crimes, including the procedures for implementing them. Courts enact rules and made determinations to insure proper interpretations of the law. The legislature preempted any rule-making authority by the court to enact standards for carrying out the death penalty.

In its brief, the State has cited Dreyer vs. Illinois, 187 U.S. 71, 47 L.Ed. 79 (1902), concerning a delegation of over-lapping powers by states. In Idaho, the legislature has implemented the rules and it is not the court's role or right to devise the standards in sentencing defendants convicted of first degree murder. The State case against the Defendant-Appellant arguing for his exposure to the death penalty is based upon assumptions and suppositions. Clearly, when a criminal statute is being construed, suppositions and assumptions do not stand in the face of the strict construction rule.

CONCLUSION

Therefore, because any exposure to the death penalty

against the Defendant-Appellant would be both an ex post facto law and without any legal basis or authority, the Defendant-Appellant respectfully submits that his Petition for Rehearing be heard and that he be sentenced according to the law in force at the time of the commission of his offense, other than the death penalty.

DATED This 24th day of March, 1978.

Respectfully submitted,

BRUCE O. ROBINSON, P.A.

By 

Bruce O. Robinson
Counsel for Defendant-Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 24th day of March, 1978,
I served a copy of the within and foregoing Appellant's
Response to Respondent's Brief in Opposition to Petition
for Rehearing in the above entitled action upon the
following:

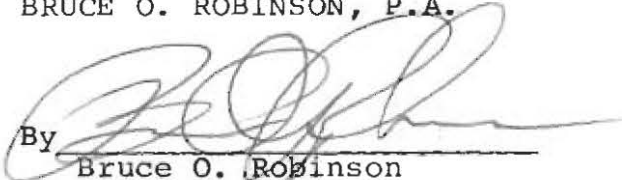
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by depositing a copy of the same in the United States mail,
postage prepaid, in an envelope addressed to the above
named persons at their addresses as the same were last
known to me.

BRUCE O. ROBINSON, P.A.

By 
Bruce O. Robinson
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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO,
Plaintiff-Respondent,
v.
THOMAS EUGENE CREECH,
Defendant-Appellant.

Supreme Court No. 12224

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR REHEARING

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Shoshone

HONORABLE J. RAY DURTSCHI
District Judge

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IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	
)	
v.)	Supreme Court No. 12224
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ARGUMENT

Introduction

This case is before the Court on an order granting a rehearing.

Creech contends that the Court's decision that he may be validly resentenced to death is 'ex post facto'. He also asserts that retrospective application of sentencing standards identified by the United States Supreme Court in 1976 intrudes upon a substantive right and cannot be justified as an exercise of the judicial power over "procedure." Thirdly, Creech contends that because the mandatory death penalty is unconstitutional, he must be set free or resentenced to life imprisonment.

Appellant's arguments on rehearing parallel those made by Mr. Justice Bakes and Mr. Justice Bistline in their dissenting opinions in this case and in the matter of State v. Lindquist, #12218, 10/20/77. Accordingly, we discuss these arguments together.

The Assertion Of Improper Retroactivity: The Ex Post Facto Clause And "Procedural Due Process"

Among the several attacks made on the majority opinion in this case are two similar but analytically distinct propositions. On the one hand, it is urged that the application of the death penalty to Creech would violate the ex post facto clauses of the federal and state constitutions by

making a new set of sentencing standards applicable to murders committed prior to the time the standards were identified in controlling case law. It is further argued that the same result would violate the "procedural due process" provisions of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.¹ This conclusion is believed to be compelled by the assumption that the assertedly retroactive application of the death penalty to Creech and Lindquist would violate some substantive right of the defendants which the Court was not entitled to invade in the exercise of its power to control procedure in the courts.

The analysis of the dissenting Justices, which was adopted by Appellant, is based on incorrect assumptions about the ex post facto clauses and the nature of "procedural due process."

The applicability of the ex post facto clause to the questions raised in this appeal was researched by the State in making its first presentation. We did not discuss it because it was not raised and we believed it plain that the ex post facto clause was not applicable in the factual and

¹ The Eighth Amendment contains the prohibition against cruel and unusual punishments but does not refer to due process of law.

legal circumstances of this case. We do not retreat from that position.

The rule that ameliorative changes in the law which might be applied retroactively do not violate the ex post facto clause is one of long standing. In Calder v. Bull, 3 Wall 386, 1 L.Ed. 648, which was decided in 1798, the Court held that a law is not ex post facto which modifies the rigor of the criminal law. Later, in 1849, the Court stated in Massingill et al v. Downs, 7 How. 760, 12 L.Ed. 903 (1849) that

. . . Retrospective laws of a remedial character may be passed; but no legislative act can change the rights and liabilities of parties which have been established by a solemn judgment.
12 L.Ed.2d at 906.

Early in the present century, the court said in Beazell v. Ohio, 269 U.S. 167, 169, 70 L.Ed. 216 (1925):

It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Nothing in the present case falls within the boundaries of that well established definition of an ex post facto law.

Any doubt that the ex post facto clauses do not prevent this Court from holding that Appellant may be validly sentenced

to death, despite the timing of his crime, was swept away only a few months ago by the United States Supreme Court in Dobbert v. Florida, ___ U.S. ___, 53 L.Ed.2d 344 (1977).

Dobbert was sentenced to death in Florida under a sentencing statute which was not in effect at the time he committed a series of murders. He argued in the Supreme Court that the backward reach of the new Florida statute caused it to be an ex post facto law. In rejecting this claim, the Court reiterated a principle repeated there for at least 160 years:

It is axiomatic that for a law to be
ex post facto it must be more onerous
than the prior law. 53 L.Ed.2d at 357

The Florida statute was considered to be ameliorative for precisely the same reason that the application of new sentencing standards in this case is ameliorative. The new procedures provide "capital defendants with more, rather than less, judicial protection." Id. Mr. Justice Bakes, for insufficient reason, refers to this characterization as a "grisly misnomer," State v. Creech, Slip, p.15, theorizing that Creech was made subject to more onerous law by the majority decision holding him liable to imposition of the penalty of death. Justice Bakes and the Appellant contend that judicial resort to constitutionally mandated sentencing procedures could not be ameliorative because "no death penalty could have constitutionally been imposed under the

statutory scheme in force at any of the times the defendant either committed the act, was tried and found guilty, or was sentenced." State v. Creech, Slip opinion p.15.

This argument flies in the face of the Supreme Court's decision in Dobbert v. Florida, supra.

Petitioner's second ex post facto claim is based on the contention that at the time he murdered his children there was no death penalty "in effect" in Florida. This is so, he contends, because the earlier statute enacted by the legislature was, after the time he acted, found by the Supreme Court of Florida to be invalid under our decision in Furman v. Georgia, supra. Therefore, argues petitioner, there is no "valid" death penalty in effect in Florida as of the date of his actions. But this sophistic argument mocks the substance of the ex post facto clause. Whether or not the old statute would, in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the state escribed to the act of murder. Dobbert v. Florida, 53 L.Ed.2d, 358-359.

Moreover, the Court made clear in Dobbert that the inhibition against ex post facto laws does not give a criminal the right to be treated in all respects by the law in force when his crime was committed. 53 L.Ed.2d at 356. Quoting from Chicot County Dist. v. Bank, 308 U.S. 371, 375, 84 L.Ed. 329, the Court pointed out that a declaration of unconstitutionality does not, in all respects, wipe out a pre-existing law.

The courts below have proceeded on the theory that the act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton v. Shelby County*, 118 U.S. 425, 442; *Chicago, I. & L. Ry. Co. v. Hackett*, 228 U.S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. 308 U.S. at 374; 53 L.Ed.2d at 359.

Accordingly, the Court found that "the existence of the statute served as an 'operative fact' to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first degree murder. This was sufficient compliance with the ex post facto provision of the United States Constitution." *Dobbert v. Florida*, 53 L.Ed.2d at 359.

Thus, the assertion that no death penalty could constitutionally have been imposed under the prior statutory scheme misses the mark because the death penalty itself was in effect at that time and a procedural change in the manner of applying it, even though it may work to the defendant's disadvantage by depriving him of a technical escape, is not an ex post facto violation. *Dobbert v. Florida*, supra. The change in sentencing standards wrought by the 1976 Supreme Court decisions and applied by the majority was ameliorative inasmuch as those changes gave capital defendants a number

of substantial judicial protections which they did not have before, including the right to present relevant mitigating evidence, the requirement that the trial court make written findings with respect to mitigation and aggravation, and the hitherto absent possibility that the addition of those factors to the sentencing equation may result in a decision by the district court that the death sentence will not be imposed. See: Dobbert v. Florida, 53 L.Ed. at 357.

Mr. Justice Bakes has suggested that Dobbert v. Florida, supra, is distinguishable from the facts here because "in Dobbert the amended state statute which passed constitutional muster was enacted after the commission of the act by the defendant, but before trial and sentencing," whereas, here, as in Lindquist, ". . . the defendant committed the act, was charged, tried, and convicted and sentenced, all at a time when the Idaho statute imposing the death penalty for first degree murder in Idaho was unconstitutional." This is a distinction without a difference. The holding of the United States Supreme Court in Dobbert v. Florida that the relevant Florida statute was not an ex post facto law was not based on any such consideration. In Dobbert the sentencing result was upheld because the change of law was procedural in that "the new statute simply altered the methods employed in determining whether the death penalty was to be imposed. . .", 53 L.Ed.2d at 356, and because the change was both

ameliorative and the punishment prescribed for the crime and the quantity and degree of proof necessary to sustain a conviction were all unaffected by the change. 53 L.Ed.2d at 357. There is not a word in the opinion to suggest that the fact that a statute was considered instead of judicially mandated procedures had any significant impact on the outcome or that the obverse circumstance would have made any difference. It is certainly unlikely that the United States Supreme Court would hold that distinction controlling because it has always deferred to the highest court of a state to announce that state's law and has been concerned only with whether the result comports with the federal Constitution.

"The Constitution commands the states to assure fair judgment. Procedural details for securing fairness it leaves to the states. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe the ultimate dignities of man which the United States Constitution assures." Carter v. Illinois, 329 U.S. 173, 91 L.Ed. 173 (1946)

See also: Georgia R. & Electric Co. v. Decatur, 176 S.E. 494, rev'd 295 U.S. 165, 79 L.Ed. 1365, reconstrued 182 S.E. 32, aff'd 207 U.S. 620, 80 L.Ed. 925; Dreyer v. Illinois, 187 U.S. 71, 47 L.Ed. 79 (1902); McGautha v. California, 402 U.S. 183, 28 L.Ed.2d 711, 734 (1971).

It is of some interest that the three dissenting justices in Dobbert (Stevens, Brennan and Marshall) expressed no disagreement with the majority views which govern this case,

that is, that an ameliorative change in law is not ex post facto and that a change in the method of reaching the capital sentencing decision is a procedural matter. The crux of the dissent was that the change in Florida law was not ameliorative because the Florida Supreme Court had previously abolished the Florida death penalty and had held that the category of "capital offenses" had ceased to exist. The consequence of this holding, in the view of the dissenting justices, was that

. . . as a matter of Florida law, the crime committed by petitioner was not a capital offense. It is undisputed, therefore, that a law passed after the offense is the source of Florida's power to put petitioner to death. 53 L.Ed.2d at 363.
[Emphasis added]

Thus it is that even the dissent in Dobbert affords no support for the minority position in Creech and Lindquist.² The power of the state to impose the penalty of death has never fallen as a matter of Idaho law.

On the same subject, Appellant cites White v. Brown, 468 F.2d 301 (9th Cir. 1972). In White the court said, almost as an aside, that Proposition 17, which proposed to restore the death penalty in California, would be ex post facto if retroactively applied to White's case. The court's conclusion

² Apart from the fact that Justices Brennan and Marshall, consistently with their long-held views, would have held the death penalty "cruel and unusual" per se.

was based on the fact that the death penalty had been declared unconstitutional per se in California prior to the time White committed the murder of which he was convicted, and the court's belief that the consequence of retroactive application of Proposition 17 would be to create a new and enhanced penalty for murder. This is the same argument advanced by the minority and rejected by the majority in Dobbert and White cannot, for that reason, be considered good law. Additionally, White is distinguishable because the death penalty has never been stricken in Idaho. No new punishment or greater punishment than that already pronounced upon Appellant could possibly be inflicted as a result of the Court's original decision.

Appellant has misinterpreted In Re Davis, 6 Idaho 766, 59 Pac. 544 (1898) which he cites as authority for the position that ". . . a person convicted of an offense and sentenced to death prior to the repeal and amendment of a death statute, must be punished under the law as it existed at the time of the commission of the offense." App. Reh. Br., p.13.

In Davis, a death sentencing statute, passed after the offense was committed, changed the place of execution from the county jail to the State penitentiary. But the statute also deprived the convict of the presence of clergy and friends at the execution. Although the case is not at all definitive in its treatment of the ex post facto clause, it is apparent

that the court considered retroactive application of the new statute ex post facto because it enhanced the severity of punishment for murder by adding to it the additional punishment of barring clergy, friends and relatives from the place of execution. The Davis court relied for its conclusion on In Re Medley, 134 U.S. 160, 33 L.Ed. 835 (1890).

Medley was concerned with a retroactive statute which added solitary confinement and secrecy about the exact day of execution to the prior death sentencing statute. The court clearly found that the statute was ex post facto only because it increased the severity of punishment by new provisions providing for solitary confinement until execution and providing that the warden should keep secret from the prisoner the exact day of punishment until the moment for execution arrived, a provision which the court considered to ". . . be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment." 33 L.Ed. at p.840.

The present matter involves no increase in the quantum or severity of punishment and the Davis/Medley rationale is not applicable. When Davis went before the United States Supreme Court, Davis v. Burke, 179 U.S. 399, 45 L.Ed. 249 (1900), the ex post facto question was raised without avail to Davis. Davis contended that the new law was ex post facto, that it had repealed the prior statute and, therefore, there was

no law under which he could be executed. The court disposed of this argument by saying that the question had been resolved against Davis in the Idaho Supreme Court and involved "no question of due process of law under the Fourteenth Amendment." Id.

The Appellant has cited numerous other cases which merely reiterate the principles discussed above and these cases need not be considered individually.

The result reached by the Court in this and the Lindquist case was also attacked as an unwarranted extension of the court's power to regulate procedure. Essentially, the argument was that the court has no power to apply sentencing standards post-dating the offenses charged because such action invades a substantive right and cannot, therefore, be considered a procedural alteration. The argument, of course, overlooks the fact that the Supreme Court, in Dobbert v. Florida, supra, considered the Florida statute as having the same effect "clearly procedural" because it ". . . simply altered the methods employed in determining whether the death penalty was to be imposed. . ." without changing ". . . the quantum of punishment attached to the crime." 53 L.Ed.2d at 256.

Furthermore, the reasoning behind the claim that the Creech and Lindquist cases were wrongly decided on procedural due process grounds is fatally flawed by the failure of the

dissenters to identify any "substantive right" which was taken away. Analysis of due process claims must begin with identification of the private interests involved. The United States Supreme Court has

" . . . often repeated that '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' Cafeteria Workers v. McElroy, 367 U.S. at 895, 6 L.Ed.2d 1230. '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' Ibid; Morrissey, 408 U.S. at 481. . . ." Wolff v. McDonnell, 418 U.S. 539, 560, 41 L.Ed.2d 935, 953 (1974)

As the State has previously argued, "procedure" is

" . . . the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 85 L.Ed. 479, 485 (1941); Sims v. United Pacific Ins. Co., 51 F.Supp. 433 (D.Idaho E.D. 1943)

It follows that the validity of the due process argument turns on whether the resentencing procedure adopted by the majority in Creech takes away a vested right.

The only route to the conclusion that it does is by way of a strikingly captious course of reasoning.

The "right" on which Justices Bakes and Bistline impliedly rely in their dissenting opinions is an assumed right vested in Creech and Lindquist to first cling to a

procedurally erroneous sentence and then impose that very sentence as a bar to carrying it out. Ordinarily, one would expect a criminal convicted of a capital offense to come before an appellate court with a demand that he be accorded the rights guaranteed by the Constitution. Appellant, however, makes the odd claim that he had a vested "right" to be wrongly sentenced. He proceeds from that supposed right to another assumed right to avoid the execution of sentence because it is wrong. The illogic in this result is even more remarkably apparent in the case of Lindquist, who was sentenced in accordance with constitutional standards. The ethereal "right" on which he proceeds springs from the unusual premise that the trial court had no power to do what the Constitution commands. The upshot of this contention is that Lindquist is said to have been aggrieved by disregard for a right to be wrongly sentenced in the first place so he could now avoid such sentence. It is very difficult to apprehend what value such a "right" has in furthering the legitimate aims of the law.

The decisions of the United States Supreme Court certainly do not compel the conclusions contended for by the Appellant. The Court could hardly have been more emphatic than it has been in rejecting the notion that a criminal defendant acquires vested rights in sentencing errors.

". . . The Constitution does not require that sentencing should be a game in which a wrong

move by the judge means immunity for the prisoner." [citation omitted] In this case the court 'only set aside what it had no authority to do and substitute[d] directions required by law to be done upon the conviction of the offender.' *Re Bonner, supra*, at 260. It did not twice put the prisoner in jeopardy for the same offense. The sentence, as corrected, imposes a valid punishment for an offense instead of an invalid punishment for that offense." *Bozza v. United States*, 330 U.S. 160, 91 L.Ed. 818, 822 (1947).

See also: *Re Bonner, supra*.

The theory that the Appellant has vested rights in an erroneous sentence is further undermined by the enhanced sentencing cases. In *Chaffin v. Stynchcombe*, 412 U.S. 17, 36 L.Ed.2d 714 (1973), *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656 (1969), and *Stroud v. United States*, 251 U.S. 15, 64 L.Ed. 103 (1919), the United States Supreme Court concluded that the Constitution did not bar higher sentences on retrials following reversals of previous convictions as long as the higher sentence was not vindictively imposed. These decisions are wholly inconsistent with the idea that a defendant acquires a vested right in a sentence once pronounced or that an incomplete sentencing statute might create a right to be improperly sentenced.

Freeborn v. Smith, 2 Wall 160, 17 L.Ed. 922 (1865) demonstrates that a litigant has no vested interest in a wrong result and that the Constitution imposes no bar to retrospective action to correct legislative omissions. In

Freeborn v. Smith, supra, the parties had appealed a decision of the Supreme Court of Nevada to the United States Supreme Court by certification. While action on the question certified was pending in the United States Supreme Court, Nevada was admitted to the Union and the territorial court ceased to exist. It was argued that the Supreme Court had no power to act inasmuch as the lower court being reviewed had ceased to exist. Congress thereafter passed legislation allowing the high court to act on all pending cases from the territory of Nevada. The defendants in error contended that the retroactive effect of the enabling legislation violated the Constitution, a contention which was turned aside.

It is objected to the act of the 27th Feb., 1865, Ch. 64 (15 stat. 440), that it is ineffective for the purpose intended by it; that it is a retrospective act interfering directly with vested rights, that the result of maintaining it would be to disturb and impair judgments which, at the time of its passage, were final and absolute; that the powers of Congress are strictly legislative, and this is an exercise of judicial power which Congress is not competent to exercise. But we are of the opinion that these objections are not well founded.

The act of Congress, admitting the State of Nevada, omitted to make such provision [as was made by the act of the 27th Feb., 1865], although the Constitution of Nevada had provided for their reception. Now, it has not been and cannot be denied, that if the provisions of the act now under consideration had been inserted in that act, the jurisdiction of this court to decide this case could not have been questioned.

By this omission, cases like the present were left in a very anomalous situation. The state could not, proprio vigore, transfer to its courts the jurisdiction of a case whose record was removed to this court, without the concurrent action of Congress. Until such action was taken, the case was suspended, and the parties left to renew their litigation in the state tribunal. What good reason can be given why Congress should not remove the impediment which suspended the remedy in this case between two tribunals, neither of which could afford relief? What obstacle was in the way of legislation to supply the omission to make provision for such cases in the original act? If it comes within the category of retrospective legislation, as has been argued, we find nothing in the Constitution limiting the power of Congress to amend or correct omissions in previous acts. It is well settled that where there is no direct constitutional prohibition, a state may pass retrospective laws, such as, in their operation, may affect suits pending and give to a party a remedy which he did not previously possess; or modify an existing remedy, or remove an impediment in the way of legal proceedings.

The passage of the act now in question was absolutely necessary to remove an impediment in the way of any legal proceeding in this case.

The omission to provide for this accidental impediment to the action of this court, did not necessarily amount to the affirmance of the judgment, and it is hard to perceive what vested right the defendant in error had in having this case suspended between two tribunals, neither of which could take jurisdiction of it; or the value of such a right if he was vested with it. If either party could be said to have a vested right, it was plaintiff in error, who has legally brought his case to this court for review, and whose remedy had been suspended by an act or circumstance, over which he had no control. If the judgment below was erroneous, the plaintiff in error had a moral right at least

to have it set aside, and the defendant is only claiming a vested right in a wrong judgment. "The truth is," says Chief Justice Parker in Foster v. Essex Bank, 16 Mass., 245, "there is no such thing as a vested right to do wrong, and the legislature which, in its acts, not expressly authorized by the Constitution, limits itself to correcting mistakes and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority." [citation omitted] Such acts are of a remedial character and are peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power. 17 L.Ed.2d at 923-924. [Emphasis added]

That a distinction is recognized between substantive and procedural matters, and that one acquires no vested rights in procedural errors, and that the distinction is rooted in the difference between occurrences which change the definition of the offense charged, or the criminal quality of the act, or deprive the accused of defense, or change the quantum of proof, on the one hand, and, on the other, things which affect only methodology, is made clear by Beazell v. Ohio, 269 U.S. 167, 70 L.Ed. 216 (1925), a case relied on by the court in Dobbert v. Florida, supra. In Beazell, a statute in effect at the time of the offense provided that persons jointly indicted could be separately tried. A statute operating retrospectively changed the prior statutory provision and made it possible for the defendants to be jointly tried. In the Supreme Court the defendants argued that they had been disadvantaged by the retroactive legislation because evidence admissible against one but not another, and which could not previously have been admitted, was brought into

their trial to their prejudice. The court, however, pointed out that the change was one of procedure and methodology, even though it might have worked to the disadvantage of the accused:

But the statute of Ohio here drawn in question affects only the manner in which the trial of those jointly accused shall be conducted. It does not deprive the plaintiffs in error of any defense previously available, nor affect the criminal quality of the act charged. Nor does it change the legal definition of the offense or the punishment to be meted out. The quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence remain the same.

Expressions are to be found in earlier judicial opinions to the effect that the constitutional limitation may be transgressed by alterations in the rules of evidence or procedure. . . . Kring v. Missouri, 107 U.S. 221, 228, 27 L.Ed. 507, 508, 510. . . And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh or arbitrary manner as to fall within the constitutional prohibition. Kring v. Missouri, 107 U.S. 221, 27 L.Ed. 507. . . But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited. . . .

Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibitions cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, [citations omitted] and not to limit the legislative control of remedies

and modes of procedure which do not affect matters of substance. . . . 70 L.Ed.2d 216.

Appellant argues that Kring v. Missouri, 107 U.S. 221, 27 L.Ed. 507 (1882), is authority for the theory that for purposes of ex post facto analysis there is no distinction between retrospective alterations in procedure on the one hand and substantive matters on the other. However, as the foregoing excerpt from the Court's opinion in Beazell v. Ohio, supra, demonstrates, the Court has not considered the language used in Kring to mean that there is any prohibition against retroactive procedural alterations which do not deprive one of a substantive right. Dobbert v. Florida, supra, is persuasive authority for the point that the resolution of this case selected by the majority revolves solely around a validly retroactive change of procedure.

The procedural alterations adopted by the majority open the way to Appellant to present mitigating evidence for which no specific provision had previously been made. However, even in a case in which new evidence was admitted at trial by a retroactively operative statute, the Supreme Court found no violation of the ex post facto clause. That conclusion was reached because the court found no vested right in a particular mode of procedure. The case was Hopt v. Utah, 110 U.S. 574, 28 L.Ed. 262 (1884), and was another case relied upon by the United States Supreme Court in Dobbert v. Florida. In Hopt, convicted felons were made

competent witnesses by a retroactively operative statute, with the result that evidence tending to implicate Hopt which could not have previously been admitted was admitted to his disadvantage.

. . . alterations which do not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but, leaving untouched the nature of the crime and the amount and degree of proof essential to conviction, only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trial thereafter had, without reference to the date of the condition of the offense charged. 28 L.Ed. at 269.
[Emphasis added]

See also: Thompson v. Missouri, 171 U.S. 380, 43 L.Ed. 204 (1898); Duncan v. Missouri, 152 U.S. 777, 38 L.Ed. 485 (1894); Usery v. Turner Elkhorn Mining Co. 428 U.S. 1, 49 L.Ed.2d 752 (1976).

Whether retroactive application of rules of law violates due process depends on fair warning or the lack of it. In Douglas v. Buder, 412 U.S. 430, 37 L.Ed.2d 52 (1973), the Supreme Court held that it was violative of due process to revoke probation for failing to report an "arrest" because it was unforeseeable that the courts of Missouri would consider a traffic citation to be an arrest. See also: Dobbert v. Florida, supra.

It has been argued that there is no basis for separating the death penalty from the mandatory death penalty or for considering the due process requirements as they apply to sentencing to be different from those applicable to the trial of the criminal case. These contentions particularly contradict Dobbert v. Florida, supra, and are refuted by constitutional rules of long standing. In Williams v. New York, 337 U.S. 239, 93 L.Ed. 1337 (1949), the court considered the question of whether it was offensive to the due process clause to allow a sentencing judge in a capital case to consider information obtained through the court's probation department and based on information supplied by witnesses with whom the defendant had no confrontation or right to cross-examine. As in this case, the process involved was the manner in which a sentencing authority proceeds to a sentencing decision. The court made it clear that due process requirements which apply at trial must be distinguished from those which apply to sentencing.

In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on the necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to

prevent tribunals concerned solely with the issue of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant--if not essential--to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. . . .

. . . The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts--state and federal--from making progressive efforts to improve the administration of criminal justice. 93 L.Ed. 1337 at 1332-1334. [Emphasis added]

In Solesbee v. Balkcom, 339 U.S. 9, 94 L.Ed. 605 (1950), Mr. Justice Black observed, for the court, that the court had previously ". . . pointed out the necessary and inherent difference between trial procedures and post conviction procedures such as sentencing." 94 L.Ed. at 607.

See also: Siipola v. Ness, 90 F.Supp. 18 (W.D.Wash. 1950).

Authority To Resentence

Mr. Justice Bakes and Mr. Justice Bistline suggest that Creech's sentence must be reduced to that applicable for second degree murder. There is an inherent contradiction in this position. If the Court has no authority to impose the

constitutional restrictions on the sentencing process, where, in all of the law, could it get the authority to impose on the defendant a sentence for a different crime than the one of which he was convicted? This is judicial legislation in its most novel form. We are told that this result is conceptually correct because one convicted of first degree murder is, at the same time, necessarily convicted of all lesser included offenses as well.

The "lesser included conviction" theory has, it is true, been adopted by a number of courts faced with the question of what to do with a convicted murderer when the applicable death penalty provision has been struck down. Apparently, these courts have recognized that to declare that a convicted murderer must be freed when the mandatory death penalty prescribed for his offense fails as a matter of constitutional law would amount to an inexcusable travesty, demeaning to the law. The solution to this problem was to contrive a principle to the effect that a conviction for first degree murder necessarily "carries with it a conviction of all lesser included offense ranging all the way down to simple assault." Collins v. State, 550 S.W.2d 643, 647-648, (Henry, J., concurring in part; dissenting in part); State v. Creech, No. 12224, 10-30-77, (Bakes, J., dissenting).

Although this invention is an easy alternative to a

sophistic and absurd result, it suffers from a logical failure with which its proponents have not even attempted to deal. Appealing as it may be to say that one convicted of first degree murder has also been convicted of all lesser included offenses, the fact is that it simply is not so. A conviction for first degree murder must include a finding of premeditation in addition to all of the elements constituting lesser included offenses. If there is any doubt that first degree murder is a different crime than other homicides it should be kept in mind that jurors are instructed that the law requires them to return a finding of guilty of first degree murder when premeditation is present in an unlawful killing with malice aforethought. For jurors to disregard this instruction and return a finding of guilty of a lesser offense when the evidence establishes first degree murder is a violation of the juror's oath. See: Woodson v. North Carolina, 428 U.S. 280, 293, 49 L.Ed.2d 944, 954 (1976).

It is apparent that the law considers the offenses different and not interchangeable. In Idaho, the legislature has said as much. I.C. 19-1719 and 18-301 provide, respectively, that a conviction or acquittal of a criminal offense constitutes an acquittal of lesser included offenses and any additional offense arising out of an act or omission which may be punished in different ways.

Moreover, if a defendant convicted of first degree

murder is also convicted of all the lesser included offenses, the same logic which produces that result also compels the conclusion that the accused is subject to different penalties for each included conviction. State v. Morris, 97 Idaho 273, 543 P.2d 498 (1975); State v. Young, 480 P.2d 345 (Ariz. 1971), appeal after remand 506 P.2d 1027 (1973). It is open to considerable doubt, however, that judges who quickly embrace the view that a first degree murder conviction includes convictions of all lesser included offenses would be nearly as ready to uphold consecutive sentences for second degree murder, manslaughter and assault imposed on a defendant convicted of a single offense of first degree murder.

The answer to this dilemma, of course, is to recognize that the court has the power to make sentencing procedures conform with constitutional requirements, even retroactively, and to do so in a manner which maximally preserves the policy enacted by the state legislature with respect to the offense of murder. This kind of judicial action is negative in character. It does not create a new penalty policy, as would be the case if the court were to decree that convicted murderers would be drawn and quartered. Instead, it restricts the legislative power to carry out a death penalty policy already enacted by raising against it barriers created by the Constitution. This is exactly the power that the judiciary

was meant to exercise in balancing legislative authority against constitutional command while giving the fullest effect to each.

See Knapp v. Schweitzer, 357 U.S. 371, 26 L.Ed.2d 1393 (1958).

Mr. Justice Bistline, in his dissent in Creech, cited a number of cases for the proposition that "once [a] death penalty statute is found unconstitutional, it is clear the death penalty cannot be imposed on the convicted criminal." It was argued that the majority had not acknowledged or attempted to distinguish the cases. To the extent that those cases stand for the argument put forward, their validity has been all but destroyed by Dobbert v. Florida, supra. In any case, we do not believe the cases cited are as authoritative as they are made out to be. All but one of the opinions reflect that the various governmental authorities never argued that the courts might mandate appropriate sentencing standards and thereby save legislative death penalty policy. It is hard to see how the State's position here could have been rejected by the opinions of courts which never considered it or anything analogous to it. See State v. Jenkins, 340 So.2d 157 (La. 1976); United States v. Johnson, 425 F.Supp. 986 (E.D.La. 1976); Blackwell v. State, 365 A.2d 545 (Md. 1976); State v. Duren, 547 S.E.2d 476 (Mo. 1976); Smith v. State, 560 P.2d 158 (Nev. 1977); State v. Rondeau,

553 P.2d 688 (N.M. 1976); People v. Velez, 388 N.Y.S.2d 519 (N.Y.Sup.Ct. 1976); State v. Warren, 232 S.E.2d 419 (N.C. 1977); Riggs v. Branch, 554 P.2d 823 (Okla.Cr.App. 1976); State v. Rumsey, 226 S.E.2d 894 (S.C. 1976); Calkins v. State, 550 S.W.2d 643 (Tenn. 1977).

In Kennedy v. State, 559 P.2d 1014 (Wyo. 1977), the State of Wyoming argued that the defendant should be re-sentenced according to constitutional standards. The court did not follow this suggestion, relying on Rockwell v. Superior Court of Ventura County, supra. The fallacy of this result is discussed elsewhere herein.

In several of the cited cases, legislative enactments required that capital defendants be resentenced to life should the death penalty be found invalid, a factor not present here. Smith v. State, supra; State v. Duren, supra; State v. Warren, supra. See also: Blackwell v. State, supra, and Riggs v. Branch, supra.

In other cases, the courts devised alternate life sentences not authorized by legislation in decisions which can only be called inconsistent with the position that it would usurp the legislature to uphold the death penalty by judicially mandated procedures. See: State v. Jenkins, supra; Boyd v. Commonwealth, 550 S.W.2d, 507 (Ky. 1977); People v. Velez, supra; Riggs v. Branch, supra, citing State v. Dickerson, 298 A.2d 761.

Courts deciding two of the cited cases said that prior statutes applicable to murder cases were revived by the failure of the death penalty statute. Collins v. State, supra; State v. Rondeau, supra.

Idaho Code, Section 73-101

An argument was made that I.C., §73-101 stands in the way of the result reached by the Court in State v. Creech, supra. The cited section states that "no part of these compiled laws is retroactive unless expressly so declared." [Emphasis added] The reference to "these" laws and the present tense employed in the words "is retroactive" suggests that the legislature intended only that the compilation of laws in existence at the time of enactment would not operate retroactively.

In any case, the majority did not apply the 1977 Idaho legislative enactment retroactively. The Court merely suggested that the statute, which complies with constitutional requirements, be used as a guide for sentencing, leaving the way open for a sentencing court to follow any other constitutionally sufficient procedure in capital cases.

We have pointed out that sentencing standards are matters of procedure and that the correction of sentences and the changing of sentencing standards are matters peculiarly within the province of the courts, at least where the legislative policy with respect to the character of the

penalty for a particular crime is not accompanied by any statement of the procedure to be observed in imposing the penalty or is accompanied by an illegal specification of procedure.

The members of the Court who disagree with that hypothesis contend that the restructuring of capital sentencing procedures by the majority of the Court amounted, in Mr. Justice Bistline's words, to "a pre-emption of the legislative function."

Legislative Intent

The State does not agree with the argument that judicially mandated sentencing procedures in this case usurp the legislature. On the contrary, the State's position supports legislative policy favoring the death penalty for first degree murder, while the contrary position would do away with it altogether in the cases now before the Court.

Mr. Justice Frankfurter believed that courts should be especially alert to avoid injecting the personal views of judges about capital punishment into the law.

. . . the nature of the duty [of judicial review]. . . makes it especially important to be humble in exercising it. Humility in this context means an alert self-scrutiny so as to avoid infusing into the vagueness of a constitutional command one's merely private notions. Like other mortals, judges, though unaware, may be in the grip of prepossessions. The only way to relax such a grip, the only way to avoid finding in the Constitution the personal bias one has placed in it, is to explore the influences that have shaped ones

unanalyzed views in order to lay bare pre-possessions.

A lifetime's preoccupation with criminal justice, as prosecutor, defender of civil liberties and scientific student, naturally leaves one with views. Thus, I disbelieve in capital punishment. But as a judge I could not impose the views of the very few states who through bitter experience have abolished capital punishment upon all the other states, by finding that "due process" proscribes it. Haley v. Ohio, 322 U.S. 596, 92 L.Ed. 224, 230 (1947), Frankfurter, J., concurring.

The United States Supreme Court, and this Court, have taken a number of steps toward modifying the rigor of sentencing procedures. In the process of doing so, the courts have themselves devised sentencing standards not rooted in any legislative action. In Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Proffitt v. Florida, 428 U.S. 242 (1976) and Jurek v. Texas, 428 U.S. 262 (1976), the Court held that the exercise of untrammelled discretion by juries in capital sentencing was not constitutionally permissible, a decision which eventually required the Court to pass on standards for narrowing discretion in imposing the death penalty in order to avoid arbitrary and capricious results--standards made necessary by judicial, not legislative, action.

Similarly, this Court has, in a series of cases, prescribed a number of specific factors which must be taken

into account by a trial court in considering an application for probation. State v. Kauffman, 94 Idaho 20, 480 P.2d 614 (1971); State v. Ogata, 95 Idaho 309, 508 P.2d 141 (1973); State v. Cornwall, 95 Idaho 680, 518 P.2d 863 (1974); State v. Allen, No. 12110, 12-28-77. See also: State v. French, 95 Idaho 853, 522 P.2d 61 (1974). Standards identified by this Court in probation matters were injected into the law by judicial action, and not by any enactment of the State legislature. Furthermore, the Idaho decisions were not based on any constitutional provision and must be viewed as expressions of the Court's procedural powers in sentencing matters.

The State does not question the Court's power to mandate such standards in sentencing proceedings. However, while the dissenting Justices have not been heard to question the Court's power to write standards for considering probation applications, they do take the incompatible position that the Court is denied the power to adopt a constitutionally sufficient methodology for making the death sentencing decision where the legislature has declared the penalty for murder but omitted to specify the procedure or specified it incorrectly.

It is a matter for each individual state to determine the methods by which the federal constitutional guarantees will be secured for its citizens. Mr. Justice Harlan,

responding to an argument that it violated the due process clause to leave to a state board of pardons the power to determine the length of a prison term within statutory maximums, said:

Whether the legislative, executive and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state. And its determination one way or the other cannot be an element of the inquiry whether the due process of law prescribed by the 14th Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty. Dreyer v. Illinois, supra, 47 L.Ed. at 85.

Accordingly, there is no constitutional obstacle to this Court's decision that the legislature's death penalty policy survives the loss of mandatory sentencing requirements and that the Court may engraft constitutional sentencing requirements on that policy in order to save it from defeat.

There seems little doubt that the legislature of the State of Idaho intended that the penalty of death should be available as a sentencing alternative in first degree murder cases. The United States Supreme Court has pointed out that the legislatures of at least 35 states responded to the Furman decision by specifying limited circumstances under which the death penalty could be imposed or by making the death penalty mandatory for certain crimes. Gregg v. Georgia,

49 L.Ed.2d at 878. Moreover, the Court recognized that the legislature, by enacting Idaho Code, §18-4004, "attempted to address the concerns expressed by the court in Furman. . ."
Gregg v. Georgia, supra, at 49 L.Ed.2d 819; fn.23, p.878.
Idaho had no mandatory death penalty statute prior to the Furman decision in 1972 and throughout the rest of the country mandatory death sentencing had previously been universally rejected. Woodson v. North Carolina, supra; Williams v. New York, supra. The mandatory death penalty statute was enacted in 1973, on the heels of the court's decision in Furman because it was thought Furman required the elimination of discretion in capital sentencing.

In view of the persistent and unswerving legislative rejection of mandatory death penalty statutes beginning in 1838 and continuing for more than 130 years until Furman, it seems evident that the post-Furman enactments reflect attempts by the states to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing. . .
Woodson v. North Carolina, 49 L.Ed.2d at 957. [Emphasis added]

It is clear that the intent of the Idaho legislature in enacting the mandatory death penalty statute, and in 1977 amending it to provide a set of standards for the exercise of guided discretion in capital sentencing decisions, was to retain the death penalty for first degree murder in a constitutional form.

This view of legislative intent is the only one reasonably possible which is consistent with a rule many times stated by this and other courts, that is, that legislative intent is to be learned by considering the conditions which gave rise to the legislation and the purposes motivating its enactment. Noble v. Glenns Ferry Bank, Ltd., 91 Idaho 364, 367, 421 P.2d 444 (1966); Messenger v. Burns, 86 Idaho 26, 29-30, 382 P.2d 913 (1963); Perkins v. Lenora Rural High School, etc., 237 P.2d 228 (Kan. 1951).

Although the legislature, when it enacted the mandatory penalty statute, incorrectly predicted what the judiciary would require to eliminate arbitrariness in the sentencing process, that happenstance does not result in the abolition of the statute's policy that the death penalty may be employed in first degree murder convictions. In Dobbert v. Florida, supra, the court held that

" . . . Whether or not the old statute would, in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose on murderers. . . ." 53 L.Ed.2d at 359.

The existence of this expression of legislative policy toward murderers was considered by the court to be "an 'operative fact' to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first degree murder." Id. It cannot be doubted that the

court held that a legislative determination that the death penalty might be imposed for murder survived a holding that the statute was unconstitutional because it failed to afford adequate sentencing discretion. The court held that the existence of a death penalty statute later found unconstitutional had consequences which cannot be ignored, and rejected Dobbert's claim that there was no "valid" death penalty in existence when he committed his crimes. 53 L.Ed.2d at 358-359.

In view of the State legislature's obvious efforts to make Idaho death sentencing procedures conform with the decisions of the United States Supreme Court, it is wholly unreasonable to conclude that the State legislature intended that its acts should somehow be interpreted as a bar to the imposition of the penalty of death. Yet that is the result to which reliance on the rule of Rockwell v. Super. Ct. of Ventura County, 134 Cal.Rptr. 650 (1976) would lead.

The distinguished, but not infallible, Supreme Court of California has rejected the arguments we make here on the ground that such action would be "contrary to the manifest legislative intent in enacting a mandatory death penalty statute." Id., 134 Cal.Rptr. at 665. When the recent

history of the death penalty in California is taken into account, the assertion of the California Supreme Court in Rockwell that the holding there was compelled by the court's deference to legislative intent takes on the appearance of a flimsy rationalization resorted to because no better explanation of such a curious result could be devised. Even prior to the decision of the United States Supreme Court in Furman v. Georgia, the Supreme Court of California declared the state's death penalty unconstitutional as a matter of state constitutional law. People v. Anderson, 493 P.2d 880 (Cal. 1972). Thereafter, the people of the state of California, acting by initiative, amended the state Constitution to provide for the death penalty. Rockwell v. Super. Ct. of Ventura County, supra. By 1976, as is known, action in California and in the legislatures of the great majority of the states of this country had made it clear that the Supreme Court of California was wrong when it concluded, without any help from the legislature or the people of California, that the death penalty was no longer consistent with "contemporary standards of decency." For at least six years the state legislature in California and the people of that state have been trying to effectuate a death penalty in California, only to be thwarted by the state Supreme Court. It is a dazzling irony that judicial disapproval of the death penalty

in Rockwell should have been paraded out as a product of legislative intent.

We do not believe the Supreme Court of California was correct in its assumption that "to save the law by rewriting it under the guise of interpretation" would cast the court in the role of "a super legislature." Rockwell v. Super. Ct. of Ventura County, 556 P.2d at 1118, Clark, J., concurring.

The most satisfactory view of an appellate court's role in the circumstances presented here was expressed by the second Justice Harlan, who was certainly not known to be an advocate of judicial intrusion into legislative functions. Mr. Justice Harlan accepted the view that it was within the power of courts to save legislative policy by repairing otherwise unconstitutional legislation.

If an important congressional policy is to be perpetuated by recasting unconstitutional legislation, as the prevailing opinion has done here, the analytically sound approach is to accept responsibility for this decision. Its justification cannot be by resort to legislative intent, as the term is usually employed, but by a different kind of legislative intent, namely the presumed grant of power to the courts to decide whether it more nearly accords with the Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend constitutional. Welsh v. United States, 398 U.S. 333, 355-356, 26 L.Ed.2d 308, 327-328 (1970) (concurring opinion) [Emphasis added]

It is this policy, and not that promoted by the California Supreme Court, which more nearly accords with the familiar

principle that it is the duty of a reviewing court to affirmatively seek an interpretation of a legislative enactment which supports its constitutionality. Leonardson v. Moon, 92 Idaho 796, 451 P.2d 542 (1969); United States v. National Dairy Products Corp., et al., 372 U.S. 29, 9 L.Ed.2d 561, 565 (1963); Sully v. American National Bank, 178 U.S. 290, 44 L.Ed. 1072 (1900). There can be no real doubt that the policy of the Idaho legislature was that the penalty of death should be available for the crime of murder in the first degree. The Rockwell theory would lead the court to cast aside the legislative policy by the operation of a hypertechnical theory in which "legislative intent" is the motivating force which brings about the defeat of legislative policy. This is a piece of highly circular reasoning which serves no valid purpose whatever, and its appearance in Rockwell suggests that the California court has fallen victim to the temptation to make the law depend upon the philosophical predispositions of its judges.

CONCLUSION

The Court's first opinion in this case should be upheld.

DATED this 10th day of March, 1978.

Respectfully submitted,

WAYNE L. KIDWELL
ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to read "Lynn E. Thomas", written over a horizontal line.

LYNN E. THOMAS
Deputy Attorney General
State of Idaho

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 10th day of March, 1978, served a true and correct copy of the above BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR REHEARING, by placing a copy in the United States mail, postage prepaid, and addressed to Mr. Bruce O. Robinson, Attorney at Law, 1320 12th Ave. South, Nampa, Idaho 83651, counsel for Appellant.

A handwritten signature in dark ink, appearing to read "Lynn E. Thomas", written over a horizontal line.

LYNN E. THOMAS
Deputy Attorney General

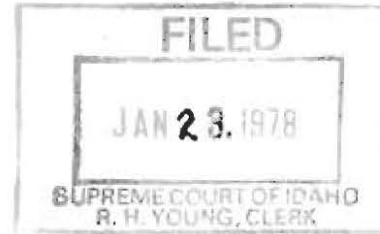
ORIGINAL

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * *

THE STATE OF IDAHO,)
)
 Plaintiff-Respondent)
 and Cross-Appellant,)
)
 vs.)
)
 THOMAS EUGENE CREECH,)
)
 Defendant-Appellant)
 and Cross-Respondent.)

No. 12224



AMENDMENT OF DEFENDANT-APPELLANT'S MEMORANDUM
IN SUPPORT OF PETITION FOR REHEARING

Appeal from the District Court of the First Judicial
District of the State of Idaho, in and for the
County of Shoshone

HONORABLE J. RAY DURTSCHI, District Judge

ROBERT REMAKLUS
Prosecuting Attorney
Valley County Courthouse
Cascade, Idaho 83611

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and Cross-Appellant

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Attorney for Defendant-
Appellant and Cross-
Respondent

BRUCE O. ROBINSON, P.A.
ATTORNEYS AT LAW - P.O. BOX 8 - NAMPA, IDAHO 83651

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * *

THE STATE OF IDAHO,)
)
Plaintiff-Respondent) No. 12224
and Cross-Appellant,)
)
vs.)
)
THOMAS EUGENE CREECH,)
)
Defendant-Appellant)
and Cross-Respondent.)
)
)

AMENDMENT OF DEFENDANT-APPELLANT'S MEMORANDUM
IN SUPPORT OF PETITION FOR REHEARING

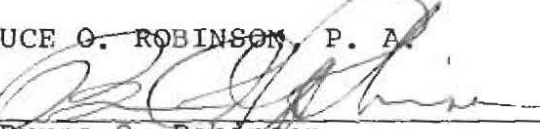
COMES NOW the defendant-appellant and cross-respondent
and hereby amends his Memorandum in Support of Petition for
Rehearing as follows:

Lines 3, 4 and 5 as they now appear on page 3 of said
Memorandum should read as follows:

"that in Bouie v. City of Columbia, 378
U.S. 347, 84 S.Ct. 1647, 1697, 12 L.Ed.2d
894 (1964), the U. S. Supreme Court has
held that the judiciary, in its construc-
tion of laws, may not impose ex post facto"

This amendment is based upon the records and files
herein and the affidavit of Bruce O. Robinson filed concurrently
herewith.

Dated this 20th day of January, 1978.

BRUCE O. ROBINSON, P. A.
By 
Bruce O. Robinson
Counsel for Defendant-Appellant
and Cross-Respondent

BRUCE O. ROBINSON, P.A. - ATTORNEYS AT LAW - P.O. BOX 8 - NAMPA, IDAHO 83651

CERTIFICATE OF MAILING

I hereby certify that I did, on the 20th day of November, 1978, serve a copy of the within and foregoing Amendment of Defendant-Appellant's Memorandum in Support of Petition for Rehearing in the above entitled matter upon the following:

ROBERT REMAKLUS
Prosecuting Attorney
Valley County Courthouse
Cascade, Idaho 83611


WAYNE L. KIDWELL
Attorney General
Room 225, Statehouse
Boise, Idaho 83720

HONORABLE J. RAY DURTSCHI
District Judge
Ada County Courthouse
Boise, Idaho 83702

by depositing a copy of the same in the United States mail, by certified mail, postage prepaid, in an envelope addressed to each of the above named persons at their addresses as the same are last known to me.

BRUCE O. ROBINSON, P. A.

By


Bruce O. Robinson

BRUCE O. ROBINSON, P.A.
BOISE, IDAHO 83720
ATTORNEYS AT LAW - P.O. BOX 8 - NAMPA, IDAHO 83651

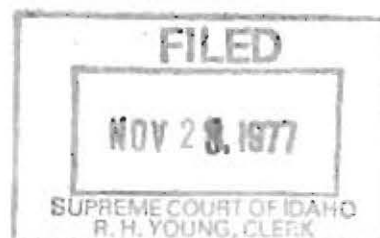
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THE STATE OF IDAHO,)
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OF PETITION FOR REHEARING

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HONORABLE J. RAY DURTSCHI, District Judge

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IN THE SUPREME COURT OF THE STATE OF IDAHO

* * *

THE STATE OF IDAHO,)
)
 Plaintiff-Respondent)
 and Cross-Appellant,)
)
 -vs-) No. 12224
)
 THOMAS EUGENE CREECH,)
)
 Defendant-Appellant)
 and Cross-Respondent.)
)

DEFENDANT-APPELLANT'S MEMORANDUM IN SUPPORT
OF PETITION FOR REHEARING

I.
A.

Defendant-Appellant, THOMAS EUGENE CREECH, was convicted of two (2) counts of Murder in the First Degree and was sentenced to death. The alleged killings took place on the 4th day of November, 1974. The trial court sentenced Defendant-Appellant pursuant to a statute which made death the mandatory penalty for First Degree Murder. Chapter 276, Section 2, 1973 Idaho Session Laws, 588. Subsequent to his sentencing, the U. S. Supreme Court decided Woodson v. North Carolina, 428 U.S. 280 (1976) which held unconstitutional such mandatory death penalty. The statute under which Defendant-Appellant was sentenced was virtually identical to the North Carolina statute, held unconstitutional in Woodson.

The Supreme Court of Idaho, after hearing oral argument at its May, 1977 term at Coeur d'Alene, Idaho, held that the sentencing scheme under which Defendant-Appellant was sentenced was unconstitutional, and remanded for new sentencing. The Court, however, upheld the conviction and the application of the death penalty to Defendant-Appellant. Under sentencing criterion, it expressed in its opinion of October 20, 1977:

"Prior to 1973, the punishment for murder was as follows: 'Every person guilty of murder in the first degree shall suffer death or be punished by imprisonment in the state prison for life.' Ch. 68, Sec. 1, 1911 Idaho Sess. Laws 190 (repealed 1971, reenacted 1972) (codified as I.C. Sec. 18-4004). Following the decision in Furman v. Georgia, 408 U.S. 238 (1972), the Idaho Legislature amended the statute by deleting therefrom the provision for life imprisonment. Ch. 276, Sec. 2, 1973 Idaho Sess. Laws 588 (amended 1977). Since the amendment is unconstitutional, however, it is void and ineffective for any purpose..."

"The sentencing procedures mandated by the Supreme Court in the recent death penalty cases are as follows: (1) there must be a hearing to consider the aggravating and mitigating circumstances surrounding the defendant's crime; (2) there must be standards to guide the sentencing authority in its election of which first degree murderer shall live and which shall die; and (3) there must be meaningful appellate review to guard against the arbitrary and capricious exercise of the sentencing power. We will consider these requirements in order..."

Defendant-Appellant now attacks the opinion of the majority on the grounds that the application of the death penalty to him would be an ex post facto law and a violation of both the U. S. Constitution and the Idaho Constitution. The U. S. Constitution, Article I, Sec. 9, Clause 3, forbids the passage by any state of any ex post facto law. The Idaho Constitution, Article I, Section 16, prohibits any ex post facto law.

Defendant-Appellant will clearly show that his exposure to the death sentencing is unconstitutional in being the application of an ex post facto law to him under both constitutional protections and the law of Idaho. Defendant-Appellant, because of the reliance of the majority of the Idaho Supreme Court in its opinion upon Dobbert v. Florida, 45 U.S.L.W. 4721, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977), feels that it is necessary to present a review of the major cases and principles of the ex post facto clause and the conclusions therefrom. Defendant-Appellant also submits that his case is distinguishable from the Dobbert case. Additionally, Defendant-Appellant will also show that the great

offense.

The court emphasized that the consequences to be applied against Kring was the law in force at the time of the alleged crime. It noted:

"It also changes the punishment, for, where-
as the law as it stood when the homicide was
committed was that, when convicted for murder
of a second degree, he could never be tried
or punished by death for murder in the first
degree, the new law enacts that he may be so
punished notwithstanding the former conviction."
107 U.S. 221 at 228.

Citing U. S. v. Hall, 2 Wash. 366, the Court pointed out that an ex post facto law is one in which in relation to the offense or its consequences, alters the situation of a party to his disadvantage. The Defendant-Appellant submits that he could not have been subjected to the death penalty at the time his alleged acts took place and maintains that the construction of current Idaho murder statutes by the majority of the Idaho Supreme Court in its recent decision upon his appeal, definitely alters the situation to his disadvantage. Referring once more to Kring, the majority have pointed out in Cummings v. Missouri, *supra* and Ex Parte Garland 4 (Wall) 277, 333, 18 L.Ed. 356, 366, that the parties there had been subjected to ex post facto laws because they were being punished in a manner not before punishable by law. The Court in Kring also noted that the ex post facto clause was intended to protect the individual rights of life and liberty against hostile, retrospective legislation. In Bouie, it was also extended to an ex post facto effect by judicial construction. In Kring, the majority cited Hartung v. The People, 22 N.Y. 95, wherein the majority there held no one can be criminally punished in this country, except according to a law prescribed and is governed before the supposed offense was committed and which existed as a law at that time. The Defendant-Appellant submits that no law pertaining to a death penalty existed at the time of his alleged commission of a crime. The majority of the

Idaho Supreme Court in State v. Creech held that the fact that substantive constitutional protections were not in existence at the time of his sentencing, were mere procedure and thus could not have had an ex post facto effect. The Defendant-Appellant maintains that those protections as enunciated in Woodson supra are substantive matters or policies which are expressed in the form of procedural due process.

The Court noted in Kring that a law which is one of procedure may be just as obnoxious to the ex post facto clause as one of substance. The court explained:

"And can any substantive right which the law gave the Defendant at the time to which his guilt relates be taken away from him by ex post facto legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot."

Defendant-Appellant submits that there is no more substantive right than the right of life. Defendant-Appellant also submits that the death penalty is more than a mere remedy or procedural action. As noted by Justice Brennan in concurring in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972):

"The unusual severity of death is manifest most clearly in its finality and enormity. Death, in these respects is in a class by itself." 289

Justice Stewart expressed the special nature of the death penalty in these words:

"Death as a punishment is unique in its severity and irrevokability; different in kind from any other punishment imposed under our system of criminal justice." Gregg v. Georgia, 428 U.S. 153, 187, 188, 96 S.Ct. 2909, 2931, 2932, 49 L.Ed.2d 859 (1976)

Perhaps the most explicit comment about the special nature of the death penalty when compared to all others is as Justice Brennan noted in Furman, supra, at 290:

"An executed person has indeed lost the right to have rights."

It becomes clear then that merely describing the effective laws

prescribed and is governed by the sovereign authority before the imputed offense was committed or by some law passed afterwards by which the punishment is not increased. The majority added that any law which altered the situation of the accused to his disadvantage passed subsequent to his crime was ex post facto. The Defendant-Appellant argues that the majority of the Idaho Supreme Court in its decision of his recent appeal, has, by construction of the present Idaho statute, engaged in an ex post facto process and has altered the situation to his disadvantage.

Any court may use judicial construction or words of judicial convenience to hold the law is not ex post facto but is just merely procedure; or that the situation of the accused has not been altered to his disadvantage; or that the punishment has not been increased. However, these facts are clear that at the time the Defendant-Appellant committed his alleged murders, he could not have been subjected to the death penalty. The law in force at that time, as all members of the Idaho Supreme Court recognized in Creech was void as far as a death penalty. The ex post facto clause forbids an increased punishment or the application of any law which alters the situation of the accused to his disadvantage as to a substantive right. There is no question that the Defendant-Appellant is being subjected to a penalty which could not be enforced against him at the time he committed his alleged acts.

The U. S. Supreme Court in a clear line of cases, has upheld this construction of the ex post facto clause. The majority in Thompson v. Utah, 170 U. S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898), held substantive rights cannot be removed from a defendant merely because it is called procedure. The Defendant-Appellant submits that Lindsey v. Washington, 301 U.S. 397, 81 L.Ed 1182, 52 S.Ct. 797, is controlling here. There, the court noted that the ex post facto clause looks to the standards of punishment

prescribed by a statute rather than to the sentence actually imposed. The court pointed out at p. 401:

"The constitution forbids the application of any new punitive measure to a crime already consummated to the detriment or material disadvantage of the wrong doer."

Once again, the Defendant-Appellant wants it pointed out that he is now being subjected to a punishment which is to his material disadvantage and detriment.

The majority in Lindsey also pointed out that in applying the ex post facto prohibition that where a standard of punishment set upon before and after the commission of an offense differs that where the later standard is more onerous the ex post facto clause takes effect.

In Bouie, supra, the Court pointed out how the construction of a statute may have ex post facto effect and that a statute must give fair warning as to its terms and make known its penalties and substance in an understandable manner. As the court pointed out, at p. 351:

"No one may be required a peril of life, liberty or property to speculate as to the meaning of penal statute. All are entitled to be informed as to what the statute commands or forbids."

The Defendant-Appellant would have been required at the time of the commission of his alleged act to speculate as to whether the death penalty could be inflicted. It was an open question at the time in the wake of Furman. Bouie pointed out that the Fourteenth Amendment forbids a person to speculate as to the meaning of a penal statute. Implicit in this concept is the penalty involved. For a crime to have no penalty is, for all practical purpose, to say there is no crime. In Bouie, the Court held that the required criminal law must have existed when the conduct in issue occurred. The majority of the Idaho Court has said that the Defendant-Appellant was given fair warning that his sentence would seek death, yet other sister states have held that one sentenced under

prohibiting the passage of any ex post facto law.

The Defendant-Appellant wishes to point out the factual similarity of this case with the present questions of law and fact here. Like Idaho, a person in California could not be put to death because of the result of judicial construction of the death statutes; Idaho's prohibition being imposed by the U. S. Supreme Court; the California prohibition being imposed by its state court. Subsequently, by acts of the people; California doing it by referendum; Idaho, by Legislative acts, sought to reimpose the death penalty. The Ninth Circuit pointed out that the referendum, even if approved, could not apply to persons convicted of first degree murder committed prior to the implementation of the act, if passed. Defendant-Appellant maintains that the same is true here. That a legislatively constitutional act inflicting the death penalty cannot be retroactively applied to him.

As the Ninth Circuit pointed out in its opinion, in holding that the maximum penalty for White's alleged crime was life imprisonment and referred to the words of Chief Justice Marshall who held that an ex post facto law is one "which renders an act punishable in a manner in which it was not punishable when it was committed." Fletcher v. Peck, supra. The court concluded in White that there was "simply no possibility that California could now sentence White to death consistently with the U. S. Constitution."

Defendant-Appellant submits that this case clearly shows that an ineffective death penalty statute cannot have constitutionally permissible cures inserted into it, after the date of his alleged crime, to expose him to the death penalty.

As Greenfield v. Scafati, 277 F.Supp. 644 (D.C. Mass., 1967), pointed out, the ex post facto clause forbids the imposition of a sentence by virtue of a change in the law greater than

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application of the amendment to a defendant convicted when the prior law was in force, would clearly be ex post facto. The court said that the amendment regulating the time, place and manner of inflicting the death penalty is not applicable to past offenses and is perspective in its operation. The Court noted that a person convicted of an offense and sentenced to death prior to the repeal and amendment of a death statute, must be punished under the law as it existed at the time of the commission of the offense. (Emphasis added.) Since the Supreme Court has recognized in Holden v. Minnesota, 137 U.S. 483, 11 S.Ct. 143, 34 L.Ed. 734, that the regulation of execution is a procedural matter which the ex post facto clause does not regulate, it is clear that Idaho has taken a much stricter construction of the ex post facto clause in its constitution. Clearly, the substantive protections provided in procedural due process are much more meaningful to a defendant than the place and time of his execution for murder. Davis also clearly stands for the proposition that the law, as it existed and was in force at the date of the commission of the offense, is the law to be applied to the accused. It also stands for the rule that death penalty statutes and their construction is to be prospective only. (Bouie, supra). Since the Idaho legislature by legislative acts in 1977, provided for a group of criteria that attempted to meet the standards of Gregg supra, it is clear that the legislative intent was to provide for a constitutionally valid death penalty. Clearly, the legislature would never have provided for the amendments and legislation in Idaho Code, Sec. 18-4003, Idaho Code, Sec. 18-4004, Idaho Code, Sec. 18-2515, if it intended for the death penalty to apply retrospectively. Defendant-Appellant challenges the Court to explain why the legislature would have enacted subsequent legislation to provide for a valid death penalty if it intended or believed that the prior legislation would constitutionally permit

the imposition of the death penalty.

The Defendant-Appellant wishes to point out two (2) more cases to the Court which prove, beyond a shadow of a doubt, that the death penalty cannot be invoked against him. In State v. Garde, 205 P.2d 504, 69 Idaho 209 (1949), the Court held where a 1939 statute made it unlawful for any individual to sell intoxicating liquor and subjected the offender to prosecution for a misdemeanor, it construed a 1947 statute which authorized the issuance of licenses for sale of intoxicating liquor by the drink and prohibited the issuance of licenses until July 1, 1947, the penal aspects of the 1947 statute could not go into effect until July 1, 1947. The court pointed out that there was a broad scheme of enforcement and regulation under the 1947 statute and that the penal part of the statute was to be implemented at the same time as the regulatory aspects. Defendant-Appellant submits this case implicitly points out the understanding of the Supreme Court that a statute increasing the penalty from a misdemeanor to felony cannot be applied retroactively.

In State v. Eikelberger, 230 P.2d 696, 71 Idaho 282 (1951), the Court held one who is convicted of a crime committed prior to the effective date of his act, cannot be sentenced except under the law in force when the crime was committed. In this case, under the prior law at the date of the commission of the offense, the accused could only have been sentenced to six (6) months in the county jail for issuance of a check with insufficient funds. The subsequent act, in effect when the Defendant was sentenced, had increased the punishment to five (5) years in the state penitentiary. The Defendant-Appellant argues that here again, the Supreme Court of Idaho recognized that a Defendant cannot be sentenced under a penal statute which increases or has the possibility of increasing the punishment compared to a sentencing criteria in existence at the time of the offense. Defendant-

Appellant wishes to stress the language in Eickelberger that one cannot be sentenced except under the law in force when the crime was committed. (Emphasis added) There is no question that the death penalty was not in effect or in force at the time of the commission of the crime. It may have been "fair warning" or "giving operative notice", but it was not in effect or in force, and any other reading is clearly illogical and unconstitutional.

The Supreme Court of Florida in Lee v. State, 294 S.2d 305 (1974), held that Lee could not be exposed to the death penalty. Lee had been sentenced under a discretionary death statute prior to the rendering of Furman. His death sentence was vacated and a life sentence was imposed. A subsequent legislative act of Florida held that one sentenced to a capital felony shall be punished by life imprisonment and serve at least 25 years before becoming eligible for parole. The Court held this provision which was enacted subsequent to the events was clearly ex post facto.

In People v. Nuss, 284 NW.2d 883 (Mich. Ct. of App., 1977), it was held that where a subsequent legislative enactment had removed the defense of finding one accused of sexual offenses to be adjudicated a sexual psychopathic person, the repeal of that statute did not subject the defendant to a prosecution for second degree murder, which he had originally been charged with. The court found that notice of fairness embodied in the constitutional provision against ex post facto laws and in the due process clause prevented the repeal of the criminal sexual psychopath statute from eliminating the defense against prosecution which was available to the defendant when he was committed. Clearly, the sexual psychopath statute was procedural but the ex post facto law forbids subsequent legislation which subjects the defendant to a greater punishment than that existing at the time of the commission of his act.

As was pointed out in State v. Jenkins, 340 S.2d 157

La., 1976), when the Louisiana death penalty statute was invalidated, the Court there held the most severe penalty established by the legislature at the time of the offense that could be imposed, would be life imprisonment. In Commonwealth v. Harrington, 323 N.E.2d 895 (Mass.), the court held that a retroactive legislative change from discretionary to mandatory death sentences, would be an unconstitutional ex post facto law, and an unforeseeable judicial decision having the same effect is equally barred by the due process clause.

The Supreme Court of Massachusetts added that under statutes then in effect, murders committed after U. S. Supreme Court decision that imposition and carrying out a death penalty in cases before such Court would constitute cruel and unusual punishment were no more subject to death penalties than murders committed before such a decision. It can be seen from this decision, that subsequent legislative or judicial acts could not impose the death penalty.

In Akins v. State, 202 S.E.2d 62 (Ga., 1973), it was noted that a death sentence could not be imposed under a pre-Furman statute. The court noted that a subsequently enacted statute believed to be constitutionally valid (as was this post-Furman, pre-Woodson mandatory death penalty statute), at the time, could not be imposed upon the accused whose crimes had occurred before the enactment of the mandatory death scheme. The court noted:

"At the time the crimes here occurred a death sentence could not be imposed, and the later enacted statute if applied to the defendant here, would of necessity be an ex post facto law. Ex post facto laws are clearly prohibited."

The Court added that the only lawful sentence which may be entered upon the finding of a jury was that the defendant should receive the mandatory sentence permitted by law. Arkansas in Upton v. Graves, 509 S.W.2d 823 (1973), reached the same result that once

an accused is sentenced under a death statute, later found to be invalid, a subsequent law which subjects him to the death penalty is an ex post facto law.

Other cases that had held that a penalty could not be increased because of an amended act which was added subsequent to the commission of the offense include People v. Wyckoff, 245 N.E.2d 316 (Ill., 1969); People v. Rosenfeld, 304 N.Y.S.2d 977 (N.Y., 1969); State v. Pardon, 157 S.E.2d 698 (N.C.); Stinson v. State, 344 S.W.2d 369 (Tenn., 1961); People v. Adcock, 4 Misc.2d 758 (N.Y., 1957); People v. Oliver, 151 N.Y.S.2d 367 (N.Y., 1956).

Defendant-Appellant wishes to point out State v. Smith, 324 A.2d 203 (Dela., 1974), that where a pre-Furman discretionary death statute was then construed by the Delaware Supreme Court as a mandatory death sentence, those who had committed alleged capital offenses prior to the construction of the Delaware statute as a mandatory death penalty law, would not be subject to the death penalty. The court pointed out that such a construction would run afoul of the ex post facto prohibitions of the constitution. The Defendant-Appellant submits that this line of cases not only stands for the proposition that a change from a discretionary to a mandatory death penalty is ex post facto, but also that the reinstatement of the death penalty once an accused has been sentenced under an invalid death penalty statute is also ex post facto.

Perhaps the best expression of these ex post facto rights was expressed in Lee v. State, 340 S.2d 474 (Fla., 1976). There, Lee had been sentenced under a pre-Furman death statute. He appealed and was resentenced to life imprisonment by the trial court. The District Court (apparently an intermediate appellate court) resentenced Lee to death under a post-Furman mandatory death statute. The Supreme Court of Florida reversed the District Court sentencing pointing out that although sentenced under the

pre-Furman statute, appellant's sentence had been commuted to life imprisonment. The court recognized that the portion of the penalty provision dealing with the amount of punishment is clearly a creature of statute and as such, forms part of the substantive law. The court noted, "We do not think the question of whether a person should live or be put to death by the statutes, should be determined by the legal procedures of when his request for reduction of sentence was made". Defendant-Appellant agrees with this statement.

Other parties accused of first degree murder in this state under the mandatory death sentence were sentenced to life imprisonment as the statute was unconstitutional. Defendant-Appellant pointed this out in his prior brief on his original appeal.

II.

A.

The Defendant-Appellant now wishes to point out some of the fallacies and improper interpretations of the law as expressed by the majority in Dobbert and Creech. The majority of the Idaho court pointed out that an accused does not have the right to be tried in all respects by the law in force when the crime charged was committed. The Defendant-Appellant agrees with this statement only so far as it regards subsequent laws that do not injure or affect him to his detriment. The majority of the Idaho court cited a list of examples of changes that they said would be barred by the ex post facto clause if, as they said, the Defendant-Appellant's construction of the clause was taken. The Defendant-Appellant wishes to point out that almost without exception, those changes that the majority cited would be changes to the benefit of a defendant rather than to his detriment. The ex post facto clause does not forbid changes to the benefit or of an ameliorative nature. A clear line of cases since Calder v. Bull, supra, have forbidden the passage of any law which deprives a party of

any substantive rights or acts to his detriment.

The majority of the U. S. Supreme Court in Dobbert, said a procedural change which works to the disadvantage of a defendant is not forbidden; however, this "disadvantage" must not be of detriment to the party. Since the U. S. Supreme Court did not overrule or reverse any prior cases concerning ex post facto laws, it is clear that a narrow construction was involved in the majority opinion. Dobbert had the advantage of the sentencing criteria found constitutional by the U. S. Supreme Court at both his trial and sentencing; the two (2) main areas where they would be used. The Defendant-Appellant did not have either of the two (2) available at the time of his trial. It may be said that even if they had been available at trial or were applied at the trial sentencing, they would not have been of an advantage to a defendant. However, this is speculative and one should not speculate with the life of a man.

The majority in both the Idaho and U. S. Supreme Court decisions speak of fair warning and operative facts given by void statutes. The Defendant-Appellant wishes to point out that a long line of U. S. Supreme Court decisions has held that a void act has no force or effect and an act that is void is as if it had never been passed. Norton v. Shelby, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178. The majority in Dobbert cited Chicot County District v. Bank, 308 U.S. 371, 84 L.Ed. 329, 60 S.Ct. 317; however, as the dissent pointed out, Chicot, speaking of operative facts, involved a civil statute and not a criminal one; and courts have traditionally always construed criminal statutes much more strictly than civil ones, particularly including the retrospective effect of such statutes.

The majority in Dobbert also pointed out that the Florida decision to apply the death penalty was not irrational since Dobbert had had the benefit of the constitutional protections at his trial and sentencing. The majority noted that Florida had

to draw the line somewhere. Here, the Defendant-Appellant had not had those sentencing criteria available to him at the time of his trial. The Defendant-Appellant suggests that the Idaho court should not hold that the sentencing criteria and the death penalty can be applied twenty-eight (28) months after the commission of the act. The Supreme Court in Dobbert said the line could be drawn at the trial and sentencing stage. The Defendant-Appellant argues that there is no reason why it should be drawn any further than that and such construction would be unconstitutional. The Defendant-Appellant adopts and agrees completely with both the dissent in Dobbert and Creech; their masterful insight and analyses should be adopted by the Idaho court in this appeal. The Defendant-Appellant feels there is no reason to restate them but includes them as further argument why the death penalty should not be imposed.

III.

A.

Since Idaho Code, Sec. 18-4004 is unconstitutional, and since the court has agreed in State v. Creech that it is void ab initio, it is clear that it cannot be the basis for any penalty. It should be noted that there is some inconsistency in the majority's opinion in Creech. They note the opinion is unconstitutional and void and ineffective for any purpose; they then contradict themselves by saying that it serves as "fair warning" and "operative notice" that the state would seek the death penalty. The majority also pointed out that there is nothing to indicate that the Legislature would have refused to retain the prior penalty statute without the 1973 amendment. The court added that the former statute remains in effect as if the amendment had never been attached.

Since the statute is void and ineffective for any purpose, Defendant-Appellant asserts that he could not be sentenced

under the statute. As he pointed out in his previous brief, citing Smith v. Costello, 290 P.2d 742, 77 Idaho 205 (1956), an unconstitutional act is inoperative as if it had never been passed. Therefore, since the statute, because of its voidness, had never existed, the Defendant-Appellant cannot be charged or sentenced and should, therefore, be set free.

As was further pointed out in Champlin Ref. Co. v. Corp. Comm., 286 U.S. 210, 52 S.Ct. 559, 86 ALR 403, 76 L.Ed. 1062, the unconstitutionality of a part of an act does not affect the validity of its remaining provisions unless it is evident that the legislature would not have enacted the statute had the invalid part been omitted. In Lynch v. U.S., 292 U.S. 571, 54 S.Ct. 840, 74 L.Ed. 1434, the court pointed out that the valid portion of a statute which contains void parts cannot stand unless it appears that the constitutional provisions can be given legal effect and that the legislature intended the unobjectionable provisions to stand in, causing that the other provisions held bad should fail. Much the same result was reached in Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160.

It seems almost simplistic to point out that the Idaho legislature would not intend to adopt a first degree murder statute without a penalty. Since the penalty portion was invalid, the legislature surely did not intend to adopt a statute where there was a crime but no punishment. Hence, the entire statute must fall.

As Defendant-Appellant pointed out in his previous brief, that Idaho Code, Sec. 18-4004 passed in connection with Idaho Code, Sec. 18-4003 is such an integral part of Idaho Code, Sec. 18-4003, that the voiding of Idaho Code, Sec. 18-4004 is unconstitutional, automatically makes that part of Idaho Code, Sec. 18-4003 which deals with first degree murder also void.

As noted in Defendant-Appellant's first brief, the crim-

inal statute without a penalty is of no effect and is void. Defendant-Appellant previously cited State v. Sulman, 339 A.2d 62, 165 Conn. 556 (1973); Application of Boyd, 189 F.Supp. 113 (1959); and Byrd v. State, 110 S.2d 52 (Fla., 1959), wherein it was noted that a crime without a penalty cannot result in a conviction when the statute creating the crime is declared unconstitutional. Therefore, since the mandatory penalty of death is unconstitutional and since it is an integral part of a statute, the statute falls, the conviction must be reversed, and the Defendant-Appellant must be set free.

B.

As Justice Bakes pointed out in his brilliant dissent, a conviction of first degree murder necessarily infers a conviction of second degree murder. State v. Hutter, 18 N.W.2d 203 (Neb., 1945), State v. Arney, 544 P.2d 334 (Kan., 1975). Although there is authority to the contrary, Defendant-Appellant maintains that this is a viable alternative when considering the fact that the death penalty cannot be imposed. Idaho's first degree murder penalty in effect at the time provided the extreme penalty of death for types of murders generally considered as a heinous nature. Murders in the second degree did not exclude murders of a heinous nature. Therefore, it would seem reasonable to assume that conviction for a first degree murder would also necessarily include a conviction for second degree murder.

Justice Bistline also concluded that the death sentence imposed upon the Defendant-Appellant is a nullity. Therefore, the maximum sentence that the trial court may impose is one of life imprisonment as being the maximum penalty for the lesser included offense of second degree murder. Defendant-Appellant agrees that this is a viable conclusion, if his conviction should stand.

C.

Justice Bistline, in his dissent, also pointed out that the court cannot adopt substantive matters as part of its rule-making power under Idaho Code, Sec. 1-212. Idaho Code, Sec. 1-213 imposes an express limitation on the rule-making power, the statute noting:

"That said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant." (1941, Ch. 90, Sec 2, p. 163)

The "procedural" standards that the court has adopted in the majority's opinion in State v. Creech, included a right to hearing to consider the aggravating and mitigating circumstances; standards to guide the sentencing authority in its determination of whether the first degree murderer shall live or die; and meaningful appellate review. The Defendant-Appellant wishes to point out that the last legislative session adopted a group of standards by which sentencing in first degree murder convictions should take place, Idaho Code, Sec. 19-2515. Since these involved rights of substantive nature, the legislature adopting those only after considering the policy behind the particular guidelines, it seems illogical to consider them merely procedure. As the majority pointed out, they provide more protections for a convicted murderer, thereby enlarging the substantive rights, which Idaho Code, Sec. 1-213 forbids the court to act upon.

The inconsistency in the majority's opinion between Idaho Code, Sec. 1-213, the legislative acts in Idaho Code, Sec. 19-2515 are apparent, and any other reading of them is an exercise in judicial convenience.

As was pointed out in Woodard v. State, 553 S.W.2d 259, (Ark., 1977), the Supreme Court in Arkansas, speaking about a constitutionally valid death statute, noted that guidelines are

necessary to enactment of a valid statute. The Court explained,

"We find it is within legislative prerogative to determine the factors to be considered by a jury when it decides whether the crime justifies the imposition of death and a sentence of life imprisonment without parole."

The courts do not enact legislation; legislatures do. It seems clear that the legislature must enact the guidelines to be applied against a convicted murderer of the first degree and not the courts. Similar thoughts were expressed in Rockwell v. Superior Court of Ventura Co., 134 Cal. Rptr. 650, 665 (1976) and French v. State, 362 N.E.2d 834, 838 (Ind., 1977).

Therefore, the question becomes, if one is convicted of first degree murder, what penalty can be imposed once it is found the death penalty is unconstitutional? Alternatively, the Defendant-Appellant argues that if, as the majority asserts in State v. Creech, that only the penalty portion of the mandatory death penalty statute is unconstitutional and the rest of the statute stands, that only life imprisonment can be imposed under that statute. As was pointed out in Jaehne v. N.Y., 128 U.S. 189, 9 S.Ct. 70, 32 L.Ed. 298, where a statute is operating both retro-spectively and in the future is valid, if divisible, as to the later portion though void as to the former, the portion which operates in the future is valid. It has also been pointed out in Poindexter v. Greenhow, 114 U.S. 270, 5 S.Ct. 903, 29 L.Ed. 185 the constitutional parts of a statute partially unconstitutional will be enforced where the parts are so distinguishably separable that each can stand alone, and where the court is able to say, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable even though the other part should fail. Clearly, the legislature of the State of Idaho would not want first degree murderers to go free because there was no valid penalty. Numerous other U.S. Supreme Court decisions have followed the rule of Poindexter. Therefore, the

the Federal Kidnapping Act (18 USC 1201(a)) does not affect the remainder of the act. This statute provided for a discretionary death penalty or life imprisonment; hence, it is clear that the Idaho Supreme Court can use the pre-Furman discretionary death sentence or life imprisonment as a valid means of sentencing the Defendant-Appellant.

D.

As pointed out in Greene v. U. S., 376 U.S. 149, 84 S.Ct. 615, 11 L.E. 2d 576, the first rule of construction is that legislation must be considered as addressed to the future rather than to the past; a retrospective operation will not be given to a statute which interferes with antecedent rights unless such is the unequivocal and inflexible import of the terms, and the manifest intention of the legislature. Since the majority in State v. Creech is attempting to give a retroactive operation to legislative standards by disguising them as judicial rules, Green is clearly applicable since Bouie forbids such judicial construction of a statute for a retroactive effect.

As Justice Bakes pointed out in his dissent in Creech the legislature, itself, has said that its acts are not to be applied retroactively unless especially so declared by the legislature. Even if the Idaho Supreme Court could, by disguising legislative acts as judicial rules, attempt a retroactive operation, clearly the legislature would not want such acts, even if disguised as judicial rules, to be given retroactive operation. As Defendant-Appellant has pointed out earlier, Idaho Code, Sec. 1-213 forbids the application of rules that shall abridge, enlarge or modify the substantive rights of any litigant. Therefore, the court is forbid by both rules relating to judicial and legislative construction from attempting a retroactive application of the standards required in Woodson and Creech.

CONCLUSION

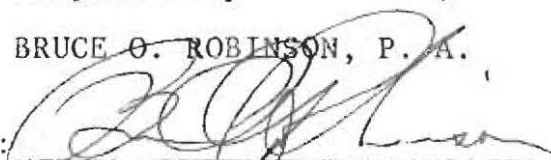
In conclusion, the Defendant-Appellant asserts that the application of the death penalty to him is an ex post facto law, unconstitutional both under the U. S. Constitution and the Idaho State Constitution. He maintains that the retroactive application of the procedures used as guidelines for sentencing in first degree murder would also be retroactive and forbidden both by judicial and legislative rules. Therefore, the Defendant-Appellant maintains that he is entitled to the following relief: (1) that since the statute under which he was sentenced is invalid and unconstitutional, he should be set free; or, (2) that since no death penalty could be inflicted upon him because of the unconstitutionality of the penalty attached to that statute, he can only be found guilty of second degree murder, since conviction of first degree murder necessarily implies a conviction of second degree murder; or, (3) that since the death penalty under both the discretionary and mandatory sentencing schemes were unconstitutional, that the only penalty in existence for first degree murder was life imprisonment.

Dated this 23 day of November, 1977.

Respectfully submitted,

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By:


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EXHIBIT "A"

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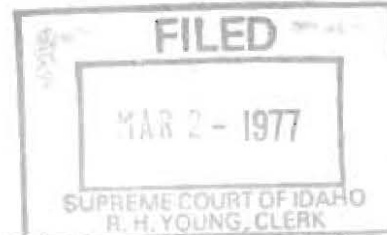
EXHIBIT "B"

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 -vs-)
)
 THOMAS EUGENE CREECH,)
)
 Defendant-Appellant.)
)
 _____)

No. 12224



RESPONSE OF APPELLANT TO RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial
District of the State of Idaho, in and for the
County of Shoshone

HONORABLE J. RAY DURTSCHI, District Judge

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IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 -vs-) No. 12224
)
 THOMAS EUGENE CREECH,)
)
 Defendant-Appellant.)
)
)

RESPONSE OF APPELLANT TO RESPONDENT'S BRIEF

The Appellant will not attempt to go through the State's Brief on a point-by-point basis since it is believed that the Appellant's original Brief, together with the cases and authorities cited, and specifically those of the United States Supreme Court's decisions of July, 1976, have fully covered the subject matter.

The trial of this Appellant on the charge of First Degree Murder, with the ultimate penalty being a mandatory death sentence if found guilty of Murder in the First Degree was a mandatory death sentence trial from the very onset. The presiding Judge and sentencing Judge believed from the very beginning that should the defendant be found guilty of Murder in the First Degree, he had no discretion regarding pronouncement of that sentence. All options were foreclosed by the statute. A complete reading of all of the Court's comments, made in both the aborted trial in Cascade, and the trial itself in Wallace, to each and every prospective juror, shows that the jurors' minds were conditioned to the fact that they had no con-

scientific examination to make in hearing this case as the penalty had been set by the Legislature. All their attention had to be directed to was a determination of the guilt or innocence and in what degree. The court, in all of these announcements of the law, stated to the jury that even the Court had no discretion under the law as announced by the Legislature. The law announced by the Legislature was mandatory death sentence on Murder in the First Degree.

The State contends that the unconstitutional aspects of the Idaho death statutes can be corrected by merely presenting the defendant before the court for a resentencing evaluation and the Court to then merely rubber-stamp a new death warrant. Apparently the State has not fully digested the true meaning of those decisions handed down by the U. S. Supreme Court in Furman vs Georgia, Gregg vs Georgia, Jurek vs Texas, Proffitt vs Florida, Roberts vs Louisiana and Woodson vs North Carolina. The magnitude of the impact of those decisions on the death penalty statutes of the several states regarding their constitutionality or unconstitutionality cannot be overcome by the mere shrugging of the shoulders and saying "Conduct a pre-sentence investigation and resentence the defendant to hang". It is as bad as "Hang him now, we'll try him later". The state of the law as spelled out by its statutes governs the manner and substance of the defense put forward by any defendant. Had the mandatory aspects of Idaho's death statutes been different, in all probability the defense asserted would also have been different. These options were closed by the mandatory aspects of the death penalty statute.

Subsequent to the United States Supreme Court's decisions of July, 1976, there has been a discriminatory application of Idaho's laws in at least three murder cases. Judge Arnold Beebe of the Seventh District in the State vs Thelma Griffith;

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Judge J. Ray Durtschi of the Fourt District, the presiding judge in this case, in the case of State vs Sally Joanne Needs; and Judge Edward J. Lodge of the Third District in the case of the State vs Louis Andrew Monroe, all held the mandatory aspects of the Idaho statute as being unconstitutional and ruled that First Degree Murder would not be applied in those cases. Excerpts from the Court's file in each of those cases have been attached hereto and made a part hereof as though set forth in full verbatim.

The law as it exists now, and as it existed at the time this defendant was alleged to have committed his acts, and when he was tried, is unclear, confusing, and arbitrarily applied.

The Legislature of the State of Idaho reacted in the same manner that the Legislatures of North Carolina and Louisiana acted after the decision made in Furman vs Georgia. They removed any discretion of the Court by making the death penalty mandatory. This did nothing to alleviate all of the other abuses on the application of the death penalty such as commuting, pardoning, etc., as spelled out in the statistical data set forth in Furman vs Georgia. It did nothing to limit the discretion exercised by the Prosecuting Attorney in making their decisions of whether to file informations of lesser degree than First. The continued application of Idaho's mandatory death penalty by reinserting discretionary application of the death penalty in no way alleviates all of the problems spelled out by the U. S. Supreme Court decisions. There are no bounds nor limits nor guidelines in the present state of Idaho's death penalty statutes.

The conclusion reached by this attorney is that Idaho has no option left except to find Idaho's death penalty statute unconstitutional and have the Legislature redraft a proper

statute in conformity with the hereinabove cited United States Supreme Court decisions.

Dated this 1st day of March, 1977.

Respectfully submitted,

ROBINSON & JONES, P. A.

By:

BRUCE O. ROBINSON
Counsel for Defendant-Appellant

CERTIFICATE OF MAILING

I hereby certify that I did on the 1st day of March, 1977, serve a copy of the within and foregoing RESPONSE OF APPELLANT TO RESPONDENT'S BRIEF in the above-entitled action, upon the following:

ROBERT REMAKLUS
Prosecuting Attorney
Valley County Courthouse
Cascade, Idaho 83611

WAYNE L. KIDWELL
Attorney General
Room 225, Statehouse
Boise, Idaho 83720

by depositing a copy of the same in the United States Mail, by certified mail, postage prepaid, in an envelope addressed to the above-named persons at their addresses as the same are last known to me.

ROBINSON & JONES, P. A.

By:

BRUCE O. ROBINSON

Dean Williams
KERR, WILLIAMS & CLARKE
Attorneys at Law
P. O. Box 708
Blackfoot, Idaho 83221
Phone (208) 785-1290

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM


STATE OF IDAHO,)	
	)	Case No. 2768
Plaintiff,)	
	)	MOTION TO DISMISS INFORMATION,
-vs-	)	OR IN THE ALTERNATIVE, TO
	)	STRIKE THEREFROM THE CHARGE
THELMA GRIFFITH,	)	OF MURDER IN THE FIRST DEGREE
)	
Defendant.)	

Comes now the Defendant, THELMA GRIFFITH, by and through her attorney of record, DEAN WILLIAMS of the firm of KERR, WILLIAMS & CLARKE, and motions the Court to dismiss the information filed herein which charges the Defendant, THELMA GRIFFITH, with the crime of FIRST DEGREE MURDER under Idaho Code 18-4001 on the grounds that the Idaho statutes attempting to define and punish murder in the first degree are unconstitutional and void.

In the alternative, the Defendant motions the Court to strike from the information all language and pleadings pretending to charge the Defendant under the first degree murder statutes of the State of Idaho. This alternative motion is made upon the grounds that the statutes of the State of Idaho relating to murder in the first degree are unconstitutional.

DATED this 20th day of July, 1976.

KERR, WILLIAMS & CLARKE


Dean Williams
Attorney for Defendant

MOTION GRANTED.

1 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
2 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
3
4

5	THE STATE OF IDAHO,	)	Case No. Cr. 7059
6	Plaintiff,)	
7	vs.	)	PARTIAL TRANSCRIPT
8	SALLY JOANNE NEEDS,	)	OF PROCEEDINGS
9	Defendant.)	

10
11

12 BEFORE
13 HONORABLE J. RAY DURTSCHI
14 DISTRICT JUDGE
15
16

17 APPEARANCES:

18 For the State:

DAVID H. LEROY, Esq.
Prosecuting Attorney
Ada County Courthouse
Boise, Idaho 83702

21 For the Defendant:

MATTHEWS LEE & WILSON
By: Ellison Matthews, Esq.
401 W. Fort Street
Boise, Idaho 83702

24

25

1 BOISE, IDAHO, FRIDAY, NOVEMBER 5, 1976 3:30 P.M.

2
3 (After several preliminary matters, the following
4 proceedings occurred.)
5

6 THE COURT: As far as the Motion For Reduction of
7 Bond, one issue that I suppose the Court somewhat injected
8 on my own motions because I felt a substantial factor in
9 fixing bond in the case is that penalty that the defendant
10 might be subjected to in this case.

11 Of course it's an accepted rule that the only
12 purpose of bond is to procure the appearance of the defendant
13 at all court appearances and, therefore, we're principally
14 concerned with any motivation for the defendant not to appear.

15 It seems to me that possible penalty is a
16 significant factor in motivating the defendant, either to
17 appear or not to appear; and that becomes highly significant
18 where there's a possibility of the death penalty.

19 I'm inclined to think that's why the Legislature
20 has, at least in the Statutes, provided that very few
21 exceptions where the death penalty is to be imposed it isn't
22 subject to bond.

23 Since the only purpose of bond is to require the
24 appearance of the defendant, I can only assume that the
25 Legislature in the making of that kind of a provision,

1 believed that the possibility of that penalty would put so
2 much pressure on the defendant that it would be inclined
3 to flee the jurisdiction and not appear. I can't see,
4 myself, any distinction if the death penalty isn't a
5 possibility in the case, if the defendant isn't to be
6 subjected to the death penalty under any circumstances, then
7 for purpose of bond setting the case is no different than
8 any other felony that carries a possible life sentence;
9 such as Armed Robbery, Rape, Lewd and Lascivious Conduct
10 because there's no greater motivation for a defendant to
11 run under a life sentence for Murder than in a life sentence
12 for Robbery or Rape or any of those crimes that carry a
13 life sentence possibility.

14 I've reviewed the Supreme Court decision and I
15 understand the State concedes, really, that there's sufficient
16 similarity between our Statute and one that was held
17 unconstitutional by the United States Supreme Court; that it
18 certainly puts ours in serious jeopardy. However, the State
19 does seek to avoid the same consequence by some other
20 alternatives; three alternatives that were suggested in the
21 State's brief.

22 I really think the statutory scheme we have for
23 penalties preclude any application of a Common Law penalty,
24 death penalty because I don't think our Statute has any gaps
25 in it.

1 There's one Statute that says that for all felonies
2 where the penalty is not otherwise provided, there's a
3 fixed penalty.

4 There's another Statute that provides for all
5 crimes enumerated where it isn't really provided, whether
6 it's a felony or misdemeanor, for purpose of penalty, shall
7 be considered the misdemeanor and misdemeanor penalty imposed.

8 Then there's the Statute the State cited regarding
9 crimes not enumerated that carry the five year penalty. But
10 I don't feel, when you look at all three of those Statutes
11 and read them all together there's really any area left for
12 imposition of any Common Law penalty.

13 I think the Statute covers all alternatives. I
14 suppose the most appealing argument the State presented was
15 the argument that the Court isn't bound by the statutory
16 penalty following the McCoy Case and the Court following the
17 lead of the United States Supreme Court can establish the
18 circumstances to be considered and determining whether the
19 death penalty should be imposed and establish guidelines
20 and criteria for the penalty; even though the Legislature
21 hasn't done it.

22 I think that the State's approach, approaches
23 this very logically because I think the State realizes that
24 no one of those points alone could lead to the death penalty;
25 they had to tie them together and relate them together.

1 I say this has some appeal if you follow the
2 McCoy Case to its logical conclusion that, well, the
3 Legislature can't bind the court anyway. The problem with
4 that is the McCoy Case, of course, the Legislature was
5 trying to impose a mandatory jail sentence along with a
6 Statute that fixed the maximum penalty. So, the Legislature
7 was still prescribing a penalty and there was still a
8 Legislature-prescribed penalty that the court could apply,
9 even though it threw out part of the Statute, the mandatory
10 ten day part of the Statute.

11 The problem you have with the Murder Statute,
12 death penalty statute is, if you through out the
13 unconstitutional part, you don't have a death penalty left.
14 As far as the Legislature has prescribed, legally that -- and
15 I say, that's why the State argued the Common Law penalty
16 point, because, I suppose, the court fixed its own guidelines,
17 could then impose the Common Law penalty if that was
18 appropriate and not have to find the legislatively-fixed
19 penalty.

20 But, because of the reason that I've already
21 said, I don't think the Court is free to impose a Common
22 Law penalty so I have two problems with the application of
23 the McCoy Case rational or doctrine.

24 Number one, where is the authority of the Court
25 to even impose the death penalty under that rational? It

1 seems to me that to say that, each judge can define his own
2 guidelines and his own criteria without limits, legislative
3 limits or other guidelines, perhaps, other than by some
4 implication in the Unites States Supreme Court decision in
5 approving certain death penalty statutes. It simply has
6 the same problem in it that the Supreme Court found in the
7 statutes that it held unconstitutional.

8 You are simply saying the court then has
9 unrestricted discretion -- I don't believe that you can
10 extend the McCoy Case that far; that each judge is justified
11 to fix his own guidelines and criteria of when the death
12 penalty can be imposed and then he can impose it if it meets
13 his guidelines and criteria.

14 So, I'm going to rule, for all purposes in this
15 case, as far as the procedure, trial procedure and for
16 purposes of fixing bail; that the death penalty is
17 unconstitutional and invalid as applied to this case and
18 the defendant cannot be subjected to it.

19 I'm going to conclude that the maximum penalty
20 she can be subjected to, under the present state of the
21 law, is life imprisonment; under the theory that Second
22 Degree Murder has to be included in a charge of First Degree
23 Murder and a Second Degree Murder penalty could be applied
24 to a First Degree Murder conviction.

25 I think that leaves, then, the Motion For

1 Reduction of Bond in the same status as far as motivation of
2 defendant to flee, based on the penalty in the same
3 category as any other felony that carries a possible life
4 sentence.

5 What I'm saying is, I think this defendant then
6 should be treated, as far as fixing bond, just as any other
7 defendant who is charged with a felony carrying a possible
8 life sentence that has the same, perhaps, connections in the
9 community and that has the same record as far as record of
10 past convictions, past trouble with the law.

11 Of course, I know counsel know that bond for
12 Robbery charges and Rape charges run all the way from -- I
13 don't know of any that are, may have even been where they
14 were on their own recognizance. I don't personally know
15 of any, but I'm certain there have been some as low as
16 \$1,500 or \$1,000 and they've gone up to as high, I suppose,
17 in the McClellan Case, I suppose \$50,000 bond or \$60,000
18 bond for Armed Robbery. I think ultimately we ended up
19 with about \$40,000 on that, didn't we, Mr. Matthews?

20 MR. MATTHEWS: I believe so, Your Honor.

21 THE COURT: That was where there was an extensive
22 past record involved of the defendant.

23 I'm not inclined to mitigate the past record
24 of the defendant as far as it applies to fixing bond as much
25 as the defendant urged me to under the explanation and

1 rational of some of those past problems she's had under
2 the escape charges. As far as I'm satisfied, that indicates
3 some disposition on her part not to comply with passes and
4 discretionary things that are given to her and left in her
5 hands; in spite of her explanation of why she violated those
6 trusts.

7 So, I feel that a substantial bond is still
8 called for with that record that she has, particularly the
9 prior escape record. But, I am going to -- I feel that
10 she's entitled to have the bond lowered to at least the
11 area that we would fix for, say, an armed robber or other
12 felony charge that -- with a similar type of past record
13 and I would -- I'm going to lower the Bond to \$25,000.

14 (Whereupon other preliminary matters were
15 disposed of and matter concluded.)

16 --oo0oo--
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1 REPORTER'S CERTIFICATE

2
3 STATE OF IDAHO)
4) ss.
5 County of Ada)

6 I, JOHN W. GAMBEE, Official Court Reporter of the
7 District Court of the Fourth Judicial District of the
8 State of Idaho, hereby certify:

9 That I attended the proceedings of the above-entitled
10 matter and reported in shorthand the testimony adduced and
11 proceedings had thereat; that I thereafter, from the
12 shorthand record made by me at said proceedings, prepared
13 a typewritten partial transcript of said testimony and
14 proceedings; that the foregoing 8 pages constitute said
15 partial transcript and that said partial transcript contains
16 a full, true, complete and correct partial transcript of
17 said proceedings.

18 IN WITNESS WHEREOF, I have hereunto set my hand
19 this 9th day of November, 1976.
20

21
22 
23 OFFICIAL REPORTER
24
25

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

SEPTEMBER

TERM, A. D. 1976

PRESENT: HON. EDWARD J. LODGE

December 8, 1976

THE STATE OF IDAHO,

Plaintiff,

vs

LOUIS ANDREW MONROE,

Defendant.

COURT MINUTES

Criminal No. C-3789

This being the time heretofore continued for hearing the defendant's Motion to Suppress, James C. Morfitt, Prosecuting Attorney, appeared for the plaintiff; the defendant, Louis Andrew Monroe, appeared in person and with his counsel, William Gigray III.

With the defense having concluded their evidence, the Court asked if the State had any rebuttle.

George William Nourse was sworn, examined, cross-examined, re-direct examined, and recross examined. Defendant's Exhibit "D" was offered and admitted into evidence. State's Exhibit "2" was offered and admitted into evidence.

Marvin L. Mullen was sworn, examined, cross-examined, re-direct examined, re-cross examined, and re-direct examined. John L. Prescott was sworn, examined and cross-examined. Bill Anderson was sworn, examined and questioned by the Court.

The State rested.

The defense rested.

The Court inquired as to which of the number of motions counsel wished to have heard first.

Mr. Gigray argued in support of the defendant's Motion for Admission

of Bail.

Mr. Morfitt argued in opposition to Defendant's Motion.

It was the position of the Court that the Death Penalty is unconstitutional and in violation of the 8th and 14th Amendments and the charge at this point is not a capital offense and the defendant is entitled to bail and bail was set at \$25,000.

The Court inquired as to whether counsel would like to be heard on the Motion to Suppress. The Court heard argument from counsel.

The Court granted Mr. Gigray time to review the State's Brief and ordered Friday, 12-10-76 at 9:00 a.m. as the time set for hearing oral argument on this matter.

Subscribed

KRING v. MISSOURI.

1. A. was convicted of murder in the first degree, and the judgment of condemnation was affirmed by the Supreme Court of Missouri. A previous sentence pronounced on his plea of guilty of murder in the second degree, and subjecting him to an imprisonment for twenty-five years, had, on his appeal, been reversed and set aside. By the law of Missouri in force when the homicide was committed this sentence was an acquittal of the crime of murder in the first degree; but before his plea of guilty was entered the law was changed, so that by force of its provisions, if a judgment on that plea be lawfully set aside, it shall not be held to be an acquittal of the higher crime. *Held*, that as to this case the new law was an *ex post facto* law, within the meaning of sect. 10, art. 1, of the Constitution of the United States, and that he could not be again tried for murder in the first degree.
2. The history of the *ex post facto* clause of the Constitution reviewed in connection with its adoption as a part of the Constitution, and with its subsequent construction by the Federal and the State courts.
3. The distinction between retrospective laws, which relate to the remedy or the mode of procedure, and those which operate directly on the offence, is unsound where, in the latter case, they injuriously affect any substantial right to which the accused was entitled under the law as it existed when the alleged offence was committed.
4. Within the meaning of the Constitution, any law is *ex post facto* which is enacted after the offence was committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage.

ERROR to the Supreme Court of the State of Missouri.

The case is stated in the opinion of the court.

Mr. Jefferson Chandler and *Mr. L. D. Seward* for the plaintiff in error.

Mr. Samuel F. Phillips for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

Kring was indicted in the Criminal Court of St. Louis for murder in the first degree, charged to have been committed Jan. 4, 1875, and he pleaded not guilty. He has been tried four times before a jury, and sentenced once on a plea of guilty of murder in the second degree. His case has been three times before the Court of Appeals, and three times before the Supreme Court of the State. In the last instance, the Supreme Court affirmed the judgment by which he was found guilty

of murder in the first degree and sentenced to be hung. He thereupon brought the present writ of error.

It is to be premised that the Court of Appeals is an intermediate appellate tribunal between the Criminal Court of St. Louis and the Supreme Court of the State, to which all appeals of this character are first taken.

At the trial, immediately preceding the last one in the court of original jurisdiction, the prisoner was permitted to plead guilty of murder in the second degree. The plea was accepted by the prosecuting attorney and the court, and he was thereupon sentenced to imprisonment in the penitentiary for twenty-five years. He took an appeal from the judgment on the ground that he had an understanding with the prosecuting attorney that if he would plead as he did, his sentence should not exceed ten years' imprisonment. The Supreme Court reversed the judgment, and remanded the case to the St. Louis Criminal Court for further proceeding, where, when the case was again called, he refused to withdraw his plea of guilty of murder in the second degree, and refused to renew his plea of not guilty, which had been withdrawn when he pleaded guilty of murder in the second degree. The court, then, against his remonstrance, made an order setting aside his plea of guilty of murder in the second degree and directing a general plea of not guilty to be entered. On this plea he was tried, found guilty, and sentenced to death, and the judgment, as we have already said, was affirmed by the Supreme Court of the State.

By refusing to plead not guilty as charged in the indictment, and to withdraw his plea of guilty of murder in the second degree, the defendant raised the point that the proceedings under that plea—namely, its acceptance by the prosecuting attorney and the court, and his conviction and sentence under it—were an acquittal of the charge of murder in the first degree, and that he could not be tried again for that offence. This point he insisted on in the Circuit Court, the Court of Appeals, and the Supreme Court.

Both these latter tribunals, in their opinions, which are a part of the record, conceded that such was the law of the State of Missouri at the time the homicide was committed. But they overruled the defence on the ground that by sect. 23, art.

2, of the Constitution of Missouri, which took effect Nov. 20, 1875, that law was abrogated, and for this reason he could be tried for murder in the first degree, notwithstanding his conviction and sentence for murder in the second degree.

As after the commission of the crime for which he was indicted this new constitution was adopted, and, as it is construed by the Court of Appeals and the Supreme Court, it changes the law as it then stood, to his disadvantage, the jurisdiction of this court is invoked on the ground that, as to this case, and as so construed, it is an *ex post facto* law, within the meaning of sect. 10, art. 1, of the Constitution of the United States.

That it may be clearly seen what the Supreme Court of Missouri decided on this subject and what consideration they gave it, we extract here all that is said in their opinion about it.

"There is nothing in the point," they say, "that after an accepted plea of guilty of murder of the second degree the defendant could not be put upon trial for murder of the first degree. We shall, on that proposition, accept what is said by the Court of Appeals in its opinion in this cause."

What that court said on this subject is as follows:—

"The theory of counsel for defendant that a plea of guilty of murder in the second degree, regularly entered and received, precludes the State from afterwards prosecuting the defendant for murder in the first degree, is inconsistent with the ruling of the Supreme Court in *State v. Kring* (71 Mo. 551), and in *State v. Stephens* (id. 535). The declarations of defendant that he would stand upon his plea already entered were all accompanied with a condition that the court should sentence him for a term not to exceed ten years, in accordance with an alleged agreement with the prosecuting attorney, which the court would not recognize. The prisoner did not stand upon his plea of guilty of murder in the second degree; he must, therefore, be taken to have withdrawn that plea, and, as he refused to plead, the court properly directed the plea of not guilty of murder in the first degree to be entered.

"Formerly it was held in Missouri (*State v. Ross*, 29 Mo. 32) that, when a conviction is had of murder in the second degree on an indictment charging murder in the first degree, if this be set aside, the defendant cannot again be tried for mur-

der in the first degree. A change introduced by sect. 23 of art. 2 of the Constitution of 1875 has abrogated this rule. On the oral argument something was said by counsel for the defendant to the effect that under the old rule defendant could not be put on his trial for murder in the first degree, and that he could not be affected by the change of the constitutional provision, the crime having been committed whilst the old constitution was in force. There is, however, nothing in this; this change is a change not in crimes, but in criminal procedure, and such changes are not *ex post facto*. *Gut v. State*, 9 Wall. 35; *Cummings v. Missouri*, 4 id. 326."

We have here a distinct admission that by the law of Missouri, as it stood at the time of the homicide, in consequence of this conviction of the defendant of the crime of murder in the second degree, though that conviction be set aside, he could not be again tried for murder in the first degree. And that, but for the change in the Constitution of the State, such would be the law applicable to his case. When the attention of the court is called to the proposition that if such effect is given to the change of the Constitution, it would, in this case, be liable to objection as an *ex post facto* law, the only answer is, that there is nothing in it, as the change is simply in a matter of procedure.

Whatever may be the essential nature of the change, it is one which, to the defendant, involves the difference between life and death, and the retroactive character of the change cannot be denied.

It is to be observed that the force of the argument for acquittal does not stand upon defendant's plea, nor upon its acceptance by the State's attorney, nor the consent of the court; but it stands upon the judgment and sentence of the court by which he is convicted of murder in the second degree, and sentence pronounced according to the law of that guilt, which was by operation of the same law an acquittal of the other and higher crime of murder charged in the same indictment.

It is sufficient for this case that the Supreme Court of Missouri, in the opinion we are examining, says it was so, and cites as authority for it the case of *State v. Ross*, 29 Mo. 32, in the same court; but counsel for plaintiff in error cites to the same

effect the cases of the *State v. Ball*, 27 Mo. 324; *State v. Smith*, 53 id. 139.

Blackstone says: "The plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or, perhaps, will be (being suspended by benefit of clergy or other causes), is a good plea in bar to an indictment. And this depends upon the same principle as the former (that is, *autrefois acquit*), that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held that a conviction of manslaughter, on an appeal or indictment, is a bar even in another appeal, and much more in an indictment for murder; for the fact prosecuted is the same in both, though the offences differ in coloring and degree." Bla. Com. Book 4, 336. See *State v. Norvell*, 2 Yerg. (Tenn.) 24; *Campbell v. The State*, 9 id. 333, 337.

This law, in force at the date of the homicide for which Kring is now under sentence of death, was changed by the State of Missouri between that time and his trial so as to deprive him of its benefit, to which he would otherwise have been entitled, and we are called on to decide whether in this respect, and as applied by the court to this case, it is an *ex post facto* law within the meaning of the Constitution of the United States.

There is no question of the right of the State of Missouri, either by her fundamental law or by an ordinary act of legislation, to abolish this rule, and that it is a valid law as to all offences committed after its enactment. The question here is, Does it deprive the defendant of any right of defence which the law gave him when the act was committed so that as to that offence it is *ex post facto*?

This term necessarily implies a fact or act done, *after* which the law in question is passed. Whether it is *ex post facto* or not relates, in criminal cases, to which alone the phrase applies, to the time at which the offence charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offence, be an *ex post facto* law. If passed after the commission of the offence, it is as to that *ex post facto*, though whether of the class forbidden by the Constitution may depend on other

matters. But so far as this depends on the *time* of its enactment, it has reference solely to the date at which the offence was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its *ex post facto* character.

In the case before us an argument is made founded on a change in this rule. It is said the new law in Missouri is not *ex post facto*, because it was in force when the plea and judgment were entered of guilty of murder in the second degree; thus making its character as an *ex post facto* law to depend, not upon the date of its passage as regards the commission of the offence, but as regards the time of pleading guilty. That, as the new law was in force when the conviction on that plea was had, its effect as to future trials in that case must be governed by that law. But this is begging the whole question; for if it was as to the offence charged an *ex post facto* law, within the true meaning of that phrase, it was *not* in force and could not be applied to the case, and the effect of that plea and conviction must be decided as though no such change in the law had been made.

Such, however, is not the ground on which the Supreme Court and the Court of Appeals placed their judgment.

"There is nothing," say they, "in this; the change is a change not in crimes, but in criminal procedure, and such changes are not *ex post facto*."

Before proceeding to examine this proposition, it will be well to get some clear perception of the purpose of the convention which framed the Constitution in declaring that no State shall pass any *ex post facto* law.

It was one of the objections most seriously urged against the new constitution by those who opposed its ratification by the States, that it contained no formal Bill of Rights. Federalist, No. lxxxiv. And the State of Virginia accompanied her ratification by the recommendation of an amendment embodying such a bill. 3 Elliot's Debates, 661.

The feeling on this subject led to the adoption of the first ten amendments to that instrument at one time, shortly after the government was organized. These are all designed to operate as restraints on the general government, and most of

them for the protection of private rights of persons and property. Notwithstanding this reproach, however, there are many provisions in the original instrument of this latter character, among which is the one now under consideration.

So much importance did the convention attach to it, that it is found twice in the Constitution, first as a restraint upon the power of the general government, and afterwards as a limitation upon the legislative power of the States. This latter is the first clause of section 10 of article 1, and its connection with other language in the same section may serve to illustrate its meaning. "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make anything but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts; or grant any Title of Nobility."

It will be observed that here are grouped contiguously a prohibition against three distinct classes of retrospective laws; namely, bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts. As the clause was first adopted, the words concerning contracts were not in it, because it was supposed that the phrase *ex post facto* law included laws concerning contracts as well as others. But it was ascertained before the completion of the instrument that this was a phrase which, in English jurisprudence, had acquired a signification limited to the criminal law, and the words "or law impairing the obligation of contracts" were added to give security to rights resting in contracts. 2 Bancroft's History of the Constitution, 213.

Sir Thomas Tomlin, in that magazine of learning, the English edition of 1835 of his Law Dictionary, says:—

"*Ex post facto* is a term used in the law, signifying something done after, or arising from or to affect another thing that was committed before."

"An *ex post facto* law is one which operates upon a subject not liable to it at the time the law was made."

The first case in which this court was called upon to construe this provision of the Constitution was that of *Caldwell v. Bull*, 3 Dall. 386, decided in 1798. The opinion was delivered

by Mr. Justice Chase, and its main purpose was to decide that the provision had no application to acts concerning civil rights. It, however, is important, as it discusses very fully the meaning of the provision in its application to criminal cases. It defines four distinct classes of laws embraced by the clause. "1st, Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d, Every law that aggravates the crime or makes it greater than it was when committed. 3d, Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed. 4th, Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender." Again he says: "But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only these that create or aggravate the crime; or increase the punishment or change the rules of evidence for the purpose of conviction."

In the case before us the Constitution of Missouri so changes the rule of evidence, that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower grade of homicide, is not received as evidence at all, or, if received, is given no weight in behalf of the offender. It also changes the punishment, for, whereas the law as it stood when the homicide was committed was that, when convicted of murder in the second degree, he could never be tried or punished by death for murder in the first degree, the new law enacts that he may be so punished, notwithstanding the former conviction.

But it is not to be supposed that the opinion in that case undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable.

Accordingly, in a subsequent case tried before Mr. Justice Washington, he said, in his charge to the jury, that "an *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which, in relation to the offence or its consequences, alters the situation of

a party to his disadvantage." *United States v. Hall*, 2 Wash. 366.

He adds, by way of application to that case, which was for a violation of the embargo laws: "If the enforcing law applies to this case, there can be no doubt that, so far as it *takes away or impairs the defence* which the law had provided the defendant at the time when the condition of this bond became forfeited, it is *ex post facto* and inoperative."

This case was carried to the Supreme Court and the judgment affirmed. 6 Cranch, 171.

The new Constitution of Missouri does take away what, by the law of the State when the crime was committed, was a good defence to the charge of murder in the first degree.

In the subsequent cases of *Cummings v. The State of Missouri* and *Ex parte Garland*, 4 Wall. 277, 333, this court held that a law which excluded a minister of the gospel from the exercise of his clerical function, and a lawyer from practice in the courts, unless each would take an oath that they had not engaged in or encouraged armed hostilities against the government of the United States, was an *ex post facto* law, because it punished, in a manner not before punished by law, offences committed before its passage, and because it instituted a new rule of evidence in aid of conviction. This court was divided in that case, the minority being of opinion that the act in question was not a crimes act, and inflicted no punishment, in the judicial sense, for any past crime, but they did not controvert the proposition that if the act had that effect it was an *ex post facto* law.

In these cases we have illustrations of the liberal construction which this court, and Mr. Justice Washington in the Circuit Court, gave to the words *ex post facto* law, — a construction in manifest accord with the purpose of the constitutional convention to protect the individual rights of life and liberty against hostile retrospective legislation.

Nearly all the States of the Union have similar provisions in their constitutions, and whether they have or not, they all recognize the obligatory force of this clause of the Federal Constitution on their legislation.

A reference to some decisions of those courts will show the

same liberality of construction of the provision, many of them going much further than is necessary to go in this case to show the error of the Missouri courts.

In *Commonwealth v. McDonough*, 13 Allen (Mass.), 581, it was held that a law passed after the commission of the offence of which the defendant stood charged, which mitigated the punishment, as regarded the fine and the maximum of imprisonment that might be inflicted, was an *ex post facto* law as to that case, because the minimum of imprisonment was made three months, whereas before there was no minimum limit to the court's discretion. This slight variance in the law was held to make it *ex post facto* and void as to that case, though the effect of the decision was to leave no law by which the defendant could be punished, and he was discharged, though found guilty of the offence.

In *Hartung v. The People*, 22 N. Y. 95, after the prisoner had been convicted of murder and sentenced to death, and while her case was pending on appeal, the legislature of that State changed the law for the punishment of murder in general, so as to authorize the governor to postpone indefinitely the execution of the sentence of death, and to keep the party confined in the penitentiary at hard labor, until he should order the full execution of the sentence or should pardon or commute it.

The Court of Appeals held that, while this later law repealed all existing punishments for murder, it was *ex post facto* as to that case, and could not be applied to it. This was decided in face of the fact that it resulted in the discharge of a convicted murderess without any punishment at all.

Denio, J., in delivering the opinion of the court, makes these excellent observations: —

"It is highly probable that it was the intention of the legislature to extend favor rather than increased severity towards the convict and others in her situation; and it is quite likely that, had they been consulted, they would have preferred the application of this law to their cases rather than that which existed when they committed the offences of which they are convicted. But the case cannot be determined on such considerations. No one can be criminally punished in this country,

except according to a law prescribed for his government before the supposed offence was committed, and which existed as a law at that time. It would be useless to speculate upon the question whether this would be so upon the reason of the thing, and according to the spirit of our legal institutions, because the rule exists in the form of an express written precept, the binding force of which no one disputes. No State shall pass any *ex post facto* law³ is the mandate of the Constitution of the United States."

This is reaffirmed by the same court in the cases of *Shepherd v. People*, 25 N. Y. 406; *Green v. Shumway*, 39 id. 418; and *In re Petty*, 22 Kan. 477, decides the same thing. In *State v. Keith*, 63 N. C. 140, the Supreme Court of North Carolina held that a law repealing a statute of general amnesty for offences arising out of the rebellion was *ex post facto* and void, though both statutes were passed after the acts were committed with which the defendant was charged.

In *State v. Snied*, 25 Tex. Supp. 66, the court held that in a criminal case barred by the Statute of Limitations, a subsequent statute which enlarged the time necessary to create a bar was, as to that case, an *ex post facto* law, and it could not be supposed to be intended to apply to it.

When, in answer to all this evidence of the tender regard for the rights of a person charged with crime under subsequent legislation affecting those rights, we are told that this very radical change in the law of Missouri to his disadvantage is not subject to the rule because it is a change, not in crimes, but in criminal procedure, we are led to inquire what that court meant by criminal procedure.

The word "procedure," as a law term, is not well understood, and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country. Fortunately a distinguished writer on Criminal Law in America has adopted it as the title to a work of two volumes. Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: "S. 2. The term 'procedure' is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, Pleading, Evidence, and Prac-

ties." And in defining Practice, in this sense, he says: "The word means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in;" and Evidence, he says, as part of procedure, "signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted."

If this be a just idea of what is intended by the word "procedure" as applied to a criminal case, it is obvious that a law which is one of procedure may be obnoxious as an *ex post facto* law, both by the decision in *Culder v. Bull*, 3 Dall. 386, and in *Cummings v. The State of Missouri*, 4 Wall. 277; for in the former case this court held that "any law which alters the legal rules of evidence, and receives less or different testimony than the law requires at the time of the commission of the offense, in order to convict the offender," is an *ex post facto* law; and in the latter, one of the reasons why the law was held to be *ex post facto* was that it changed the rule of evidence under which the party was punished.

But it cannot be sustained without destroying the value of the constitutional provision, that a law, however it may invade or modify the rights of a party charged with crime, is not an *ex post facto* law, if it comes within either of these comprehensive branches of the law designated as Pleading, Practice, and Evidence.

Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by State legislation after the offense was committed, and such legislation not held to be *ex post facto* because it relates to procedure, as it does according to Mr. Bishop?

And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot.

Some light may be thrown upon this branch of the argument by a recurrence to a few of the numerous decisions of the highest courts construing the associated phrase in the same sentence

of the Constitution which forbids the States to pass any law impairing the obligation of contracts. It has been held that this prohibition also relates exclusively to laws passed after the contract is made, and its force has been often sought to be evaded by the argument that laws are not forbidden which affect only the *remedy*, if they do not change the nature of the contract, or act directly upon it.

The analogy between this argument and the one concerning laws of procedure in relation to the contiguous words of the Constitution is obvious. But while it has been held that a change of remedy made after the contract may be valid, it is only so when there is substituted an adequate and sufficient remedy by which the contract may be enforced, or where such remedy existed and remained unaffected by the new law. *Tennessee v. Sneed*, 96 U. S. 69.

On this point it has been held that laws are void enacted after the date of the contract:—

1. Which give the debtor a longer stay of execution after judgment. *Blair v. Williams*, 4 Litt. (Ky.) 34; *McKinney v. Carroll*, 5 Mon. (Ky.) 96.

2. Which require on a sale of his property under execution an appraisement, and a bid of two-thirds the value so ascertained. *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 id. 608; *Sprott v. Reid*, 3 Greene (Iowa), 489.

3. Which allow a period of redemption after such sale. *Lapsley v. Brashears*, 4 Litt. (Ky.) 47; *Cargill v. Power*, 1 Mich. 369; *Robinson v. Howe*, 13 Wis. 341.

4. Which exempt from sale under judgment for the debt a larger amount of the debtor's property than was exempt when the debt was contracted. *Edwards v. Kearzey*, 96 U. S. 595, and the cases there cited; Story's Commentary on the Constitution, sect. 1385.

There are numerous similar decisions showing that a change of the law which hindered or delayed the creditor in collecting his debt, though it related to the remedy or mode of procedure by which it was to be collected, impaired the obligation of the contract within the meaning of the Constitution.

Why is not the right to life and liberty as sacred as the right growing out of a contract? Why should not the contig-

nous and associated words in the Constitution, relating to retroactive laws, on these two subjects, be governed by the same rule of construction? And why should a law, equally injurious to the rights of the party concerned, be under the same circumstances void in one case and not in the other?

But it is said that at the time the prisoner pleaded guilty of murder in the second degree, and at the time he procured the reversal of the judgment of the criminal court on that plea, the new constitution was in force, and he was bound to know the effect of the change in the law on his case.

We do not controvert the principle that he was bound to know and take notice of the law. But as regards the effect of the plea and the judgment on it, the Constitution of Missouri made no change.

It still remained the law of Missouri, as it is the law of every State in the Union, that so long as the judgment rendered on that plea remained in force, or after it had been executed, the defendant was liable to no further prosecution for any charge found in that indictment.

Such was the law when the crime was committed, such was the law when he pleaded guilty, such is the law now in Missouri and everywhere else. So that, in pleading guilty under an agreement for ten years' imprisonment, both he and the prosecuting attorney and the court all knew that the result would be an acquittal of all other charges but that of murder in the second degree.

Did he waive or annul this acquittal by prosecuting his writ of error? Certainly not by that act, for if the judgment of the lower court sentencing him to twenty-five years' imprisonment had been affirmed, no one will assert that he could still have been tried for murder in the first degree. Nor was there anything else done by him to waive this acquittal. He refused to withdraw his plea of guilty. It was stricken out by order of the court against his protest. He refused then to plead not guilty, and the court in like manner, against his protest, ordered a general plea of not guilty to be filed. He refused to go to trial on that plea, and the court forced him to trial.

The case rests, then, upon the proposition that, having an

erroneous sentence rendered against him on the plea accepted by the court, he could only take the steps which the law allowed him to reverse that sentence at the hazard of subjecting himself to the punishment of death for another and a different offence of which he stood acquitted by the judgment of that court.

That he prosecuted his legal right to a review of that sentence with a halter around his neck, when, if he succeeded in reversing it, the same court could tighten it to strangulation, and if he failed, it did him no good. And this is precisely what has occurred. His reward for proving the sentence of the court of twenty-five years' imprisonment (not its judgment on his guilt) to be erroneous, is that he is now to be hanged instead of imprisoned in the penitentiary. No such result could follow a writ of error before, and as to this effect the new constitution is clearly *ex post facto*. The whole error, which results in such a remarkable conclusion, arises from holding the provision of the new constitution applicable to this case, when the law is *ex post facto* and inapplicable to it.

If Kring or his counsel were bound to know the law when they prosecuted the writ of error, they were bound to know it as we have expounded it. If they knew that by the words of the new constitution such a judgment of acquittal as he had when he undertook to reverse it would be no longer an acquittal after it was reversed, they also knew that, being as to his case an *ex post facto* law, it could have no such effect on that judgment.

We are of opinion that any law passed after the commission of an offence which, in the language of Mr. Justice Washington, in *United States v. Hall*, "in relation to that offence, or its consequences, alters the situation of a party to his disadvantage," is an *ex post facto* law; and in the language of Denio, J., in *Hartung v. The People*, "No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, and which existed as a law at the time."

Tested by these criteria, the provision of the Constitution of Missouri which denies to plaintiff in error the benefit which the previous law gave him of acquittal of the charge of murder in the first degree, on conviction of murder in the second

degree, is, as to his case, an *ex post facto* law within the meaning of the Constitution of the United States, and for the error of the Supreme Court of Missouri, in holding otherwise, its judgment will be reversed, and the case remanded to it, with direction to reverse the judgment of the Criminal Court of St. Louis, and for such further proceedings as are not inconsistent with this opinion; and it is

So ordered.

MR. JUSTICE MATTHEWS, with whom concurred MR. CHIEF JUSTICE WAITE, MR. JUSTICE BRADLEY, and MR. JUSTICE GRAY, dissenting.

The Chief Justice, Mr. Justice Bradley, Mr. Justice Gray, and myself are unable to concur in the judgment and opinion of the court in this case, and the importance of the question determined constrains us to state the grounds of our dissent. The material facts are these: The plaintiff in error, at March Term, 1875, of the St. Louis Criminal Court, was indicted for murder in the first degree. On his arraignment he pleaded "not guilty." At the November Term of the same year a trial was had, which resulted in a verdict of guilty of murder in the first degree, and a sentence of death. That judgment was reversed on appeal, and twice subsequently there were mistrials. On Nov. 12, 1879, the defendant, by consent of the circuit attorney and leave of the court, withdrew his plea of not guilty and entered a plea of guilty of murder in the second degree. He was thereupon sentenced to imprisonment in the penitentiary for a term of twenty-five years. The prisoner then filed a motion to set aside this judgment and sentence, and to allow him to withdraw the plea of guilty of murder in the second degree and to permit him "to have his original plea of not guilty entered of record to the end that he may have a trial upon the merits of his case before a jury." In support of this motion reasons were assigned, in substance, that he had withdrawn his original plea of not guilty and entered the plea of guilty of murder in the second degree, upon the faith of an understanding previously had with the circuit attorney representing the prosecution, that if he would do so the sentence should not exceed ten years in the penitentiary, which under-

standing was violated by the sentence complained of. The court overruled the motion, but on appeal the judgment was reversed on the ground alleged by the prisoner, that he had been misled, and the cause was remanded for further proceedings. On receipt of this mandate, the trial court, the prisoner refusing to withdraw his plea of guilty of murder in the second degree and to enter a plea of not guilty, entertained the motion previously made by him, for refusing to grant which the judgment had thus been reversed, and granted it, setting aside the plea of guilty, and, the prisoner standing mute, ordered a plea of not guilty to be entered. On this plea a trial was had at October Term, 1881, when he was found guilty of murder in the first degree and again sentenced to death. An appeal was prosecuted from this judgment, which, however, was affirmed by the Supreme Court of Missouri, and is brought here for examination by the present writ of error, on the ground that it has been rendered in violation of a right secured to him by the Constitution of the United States.

The right which it is alleged has been violated is supposed to arise in this way. At the time of the commission of the offence in 1875, it was well established as the law of Missouri, by the decisions of the Supreme Court of the State, that "when a person is indicted for murder in the first degree, and is put upon his trial and convicted of murder in the second degree and a new trial is ordered at his instance, he cannot legally be put upon his trial again for the charge of murder in the first degree; he can be put upon his trial only upon the charge of murder in the second degree." *State v. Ross*, 29 Mo. 32; *State v. Smith*, 53 id. 139. And it is not denied that a plea of guilty of murder in the second degree, accepted by the State, would have been at that time equally an acquittal of the charge of murder in the first degree, having the same force as to future trials as a conviction of murder in the second degree, although the judgment should be reversed on the application of the prisoner.

On Nov. 30, 1875, the State of Missouri adopted a new constitution, which contained (sect. 23, art. 2) the provision, that, "if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the

prisoner on a proper indictment, or according to correct principles of law."

In the case of *State v. Simms*, 71 Mo. 538, it was decided that this provision overthrows the rule laid down in the case of *State v. Ross*, *ubi supra*, and was "equivalent to declaring that when such judgment is reversed for error at law, the trial had is to be regarded as a mistrial, and that the cause, when remanded, is put on the same footing as a new trial, as if the cause had been submitted to a jury, resulting in a mistrial by the discharge of the jury in consequence of their inability to agree on a verdict."

The rule thus introduced by the Constitution of 1875 was the one applied in the trial of the prisoner, instead of that previously in force; and the contention is, that to apply it in a case such as the present, where the alleged offence was committed prior to the adoption of the new constitution, is to give it operation as an *ex post facto* law, in violation of the prohibition of the Constitution of the United States.

In examining this proposition it must constantly be borne in mind, that the plea of guilty of murder in the second degree, the legal effect of which, when admitted, is the preying subject of the question, was entered long after the new rule established by the Constitution of Missouri took effect; that the prisoner himself moved to set it aside, and for leave to renew his plea of not guilty, on the ground that he had been misled into making his plea of guilty under circumstances that would make it operate as a fraud upon his rights, if it were permitted to stand; and that, because the court denied this motion, he made and prosecuted his appeal for a reversal of its judgment, in full view of the rule, then in force, of the application of which he now complains, which expressly declared what should be the effect of such a reversal.

The classification of *ex post facto* laws first made by Mr. Justice Chase, in *Calder v. Bull*, 3 Dall. 386, 390, seems to have been generally accepted. It is as follows: "1st, Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d, Every law that aggravates a crime or makes it greater than it was when committed. 3d, Every law that

changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th, Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender." This definition was the basis of the opinion of the court in *Cummings v. The State of Missouri*, 4 Wall. 277, and *Ex parte Garland*, id. 333, and was expressly relied on in the opinion of the dissenting judges, which says: "This exposition of the nature of *ex post facto* laws has never been denied, nor has any court or any commentator on the Constitution added to the classes of laws here set forth, as coming within that clause of the organic law." p. 391.

Now, under which of these heads does the controverted rule of the Missouri Constitution fall? It cannot be contended that it is embraced in either of the first three. If in any, it must be covered by the fourth. But what rule of evidence, existing at the time of the commission of the offence, is altered to the disadvantage of the prisoner? The answer made is this: that, at that time, an accepted plea of guilty of murder in the second degree was conclusive proof that the prisoner was not guilty of murder in the first degree, and that it was abrogated, so as to deprive the prisoner of the benefit of it. But while that rule was in force, the prisoner had no such evidence of which he could avail himself. How, then, has he been deprived of any benefit from it? He had not, during the period while the rule was in force, entered any plea of guilty of murder in the second degree, and no such plea had been admitted by the State. All that can be said is, that if, while the rule was in force he had entered such a plea with the consent of the State, its legal effect would have been as claimed, and by its change he has lost what advantage he would have had in such a contingency. But it does not follow that such a contingency would have happened. It was not within the power of the prisoner to bring it about, for it required the concurrence and consent of the State; and it cannot be assumed that, under such a rule and in such a case, that consent would have been given. It is not enough to say that, under a ruling of the court, a party might have lost the benefit of certain evidence,

if such evidence had existed. To predicate error in such a case, it must be shown that the party had evidence of which, in fact, he has been illegally deprived. Such a case would have been presented here, if the plea of guilty of murder in the second degree had been entered and accepted before the Constitution of 1875 took effect and while the old rule was in force. Then the law would have taken effect upon the transaction between the prisoner and the prosecution, in the acceptance of his plea; the *status* of the prisoner would have been fixed and declared; he would have stood acquitted of record of the charge of murder in the first degree; and the new rule would have been an *ex post facto* law if it had made him liable to conviction and punishment for an offence of which by law he had been declared to be innocent.

But, in the circumstances of the present case, the evidence, of which it is said the prisoner has been deprived, came into being after the law had been changed. It was evidence created by the law itself, for it consists simply in a technical inference; and the law in force when it was created necessarily determines its quality and effect. That law did not operate upon the offence to change its character; nor upon its punishment to aggravate it; nor upon the evidence which, according to the law in force at the time of its commission, was competent to prove or disprove it. It operated upon a transaction between the prisoner and the prosecution, which might or might not have taken place; which could not take place without mutual consent; and when it did take place, that consent must be supposed to have been given by both with reference to the law as it then existed, and not with reference to a law which had then been repealed.

It is the essential characteristic of an *ex post facto* law that it should operate retrospectively, so as to change the law in respect to an act or transaction already complete and past. Such is not the effect of the rule of the Constitution of Missouri now in question. As has been shown, it does not, in any particular, affect the crime charged, either in its definition, punishment, or proof. It simply declares what shall be the legal effect, in the future, of acts and transactions thereafter taking place. It enacts that any future erroneous and unlaw-

ful conviction for a less offence, thereafter reversed on the application of the accused, shall be held for naught, to all intents and purposes, and shall not, after such reversal, operate as a technical acquittal of any higher grade of crime, for which there might have been a conviction under the same indictment. It imposes upon the prisoner no penalty or disability. It cannot affect the case of any individual, except upon his own request, for he must take the first step in its application. When he pleads guilty of murder in the second degree, he knows that its acceptance cannot operate as an acquittal of the higher offence. When he asks to have the conviction reversed, he understands that if his application is granted, the judgment must be set aside with the same effect as if it had never been rendered. It does not touch the substance or merits of his defence, and is in itself a sensible and just rule in criminal procedure.

And, "so far as mere modes of procedure are concerned," says Judge Cooley, Const. Lim. 272, "a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained and applied to past transactions, as doubtless would be any similar statute calculated merely to improve the remedy, and in its operation working no injustice to the defendant and depriving him of no substantial right." Accordingly it was held by this court, in *Gut v. The State*, 9 Wall. 35, in the language of Mr. Justice Field, delivering its opinion, that "a law changing the place of trial from one county to another

county in the same district, or even to a different district from that in which the offence was committed or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offence or the finding of the indictment." And in the case of *Ex parte McCordle*, 7 Wall. 506, it was the unanimous decision of the court, that it was competent for Congress, in a case affecting personal liberty, to deprive the complaining party of the benefit of an appeal from the judgment of an inferior court, after his appeal had taken effect and while it was pending. It would have been equally competent for the Constitution of Missouri to have declared that no appeal or writ of error should thereafter be allowed to reverse the judgment of the court of original jurisdiction in any pending criminal cause, which certainly would be giving a different, because irreversible, effect to that judgment from what such judgments would have had under the law in force when the offence was committed. If it be true, in the logic of the law, as it is in all its other applications, that the greater includes the less, then it was competent for that constitution to provide that, as to all judgments in criminal cases thereafter rendered, which should be reversed for error, on the appeal of the defendant, the effect of the reversal should be such as not to be a bar to a subsequent conviction for any crime described in the indictment; for that would have been to say, not that there shall be no appeal at all, but that if an appeal is taken its effect shall only be such as is prescribed in the law allowing it.

In *Commonwealth v. Holley*, 3 Gray (Mass.), 458, Shaw, C. J., said: "The object of the Declaration of Rights was to secure substantial privileges and benefits to parties criminally charged; not to require particular forms, except where they are necessary to the purposes of justice and fair dealing towards persons accused, so as to insure a full and fair trial." And in *Commonwealth v. Hall*, 97 Mass. 570, the court, speaking of a statutory provision authorizing the amendment of indictments, so as to allege a former conviction, the effect of which was to increase the penalty, said: "We entertain no doubt of the constitutionality of this section, which promotes the ends of justice by taking away a purely technical objection, while

it leaves the defendant fully and fairly informed of the nature of the charge against him, and affords him ample opportunity for interposing every meritorious defence. "Technical and formal objections of this nature are not constitutional rights." These observations, it is not necessary to point out, are entirely applicable to the present argument.

Still stronger and more to the point is what was said by Shaw, C. J., in *Jacquins v. Commonwealth*, 9 Cush. (Mass.) 279, where it was held that a statute authorizing the Supreme Judicial Court, on a writ of error, on account of error in the sentence, to render such judgment therein as should have been rendered, applied to past judgments, and was not, on that account, an *ex post facto* law. That eminent judge said: "It was competent for the legislature to take away writs of error altogether, in cases where the irregularities are formal and technical only, and to provide that no judgment should be reversed for such cause. It is more favorable to the party to provide that he may come into court upon the terms allowed by this statute, than to exclude him altogether. This act operates like the act of limitations. Suppose an act was passed that no writ of error should be taken out after the lapse of a certain period. It is contended that such an act would be unconstitutional, on the ground that the right of the convict to have his sentence reversed upon certain conditions had once vested. But this argument overlooks entirely the well-settled distinction between rights and remedies."

Precisely the same distinction between laws *ex post facto* and those which merely affect the remedy, and are, therefore, applicable to the case of an offence previously committed, is well illustrated by the case of *Ratzky v. The People*, 29 N. Y. 124. There the prisoner had been convicted of murder in the first degree; the offence was committed when the act of 1860 was in force, which prescribed the mode of punishment; he was sentenced, however, in accordance with the terms of an act passed in 1862, subsequently to the commission of the offence, and which prescribed a different mode of punishment. On this account the judgment was held to be erroneous and was reversed, on the ground that the act of 1862, applied to offences previously committed, was *ex post facto*. But at the

time of the commission of the offence, in 1861, it was the well-settled law of New York, as decided in *Shepherd v. The People*, 25 N. Y. 406, that when a wrong judgment had been pronounced, although the trial and conviction were regular, the prisoner could not, on reversal of the judgment, be subject to another trial, but would be entitled to his discharge. But, on April 24, 1863, after the prisoner had been tried and convicted, but before judgment and sentence were pronounced, an act of the legislature took effect, which provided that the appellate court should have power, upon any writ of error, when it should appear that the conviction had been legal and regular, to remit the record to the court in which such conviction had been had, to pass such sentence thereon as the appellate court should direct. But for the authority conferred by this act, the Court of Appeals stated that it would have had no power, upon reversal of the judgment of the Supreme Court, either to pronounce the appropriate judgment, or remit the record to the oyer and terminer to give such judgment; but, on the contrary, would have been obliged to have discharged him, the law not authorizing another trial. Nevertheless, the Court of Appeals gave effect to the act of 1863, reversed the judgment, and sent the record down with directions to sentence the prisoner to death, in accordance with the provisions of the act of 1860, holding that the act of 1863 was not an *ex post facto* law. And yet it deprived the prisoner of the benefit of a rule of law, in force at the time the offence was committed; viz., that if he should be erroneously sentenced and the judgment should be reversed, he would be entitled to be discharged and forever after protected against further prosecution for the same offence, as well as against any second judgment upon the same verdict.

This decision deserves particular consideration, for it involves the very question under discussion. At the time of the commission of his offence, and at the time of his trial and conviction, a rule of law in New York had been well established, that upon a reversal of judgment in a capital case, for error in the sentence, the prisoner was entitled to be discharged, and his former conviction, notwithstanding the reversal, was a conclusive defence upon any subsequent trial for the same offence. After trial and conviction a statute was passed which abrogated

that rule and declared that a subsequent reversal of judgment for error merely in the sentence should not have that effect, but that, even without a new trial, a new judgment might be entered upon the verdict. This gave to the verdict and to the subsequent proceeding an effect entirely different from what they would have had under the law as it stood at the time of the commission of the offence, and deprived the prisoner of the advantage of the rule then in force. After that statute took effect he prosecuted a writ of error and reversed the judgment for error in the sentence, and it was held that the effect of that reversal was determined by the law in force when it was rendered, and not by the law in force when the trial and verdict were had and when the offence was committed.

Davies, J., said, p. 132: "It would follow from these considerations and the authority of the case of *The People v. Shepherd*, 25 N. Y. 406, that a wrong judgment having been pronounced, although the trial and conviction were regular, this prisoner could not be subjected to another trial and would be entitled to his discharge. That would unquestionably be so but for the act of April 24, 1863. . . . In the present case that act became operative before the judgment and sentence were pronounced and given and before the writ of error was prosecuted to this court. It was, therefore, in force when the writ of error in this case was prosecuted, and its provisions are applicable to the duty imposed upon this tribunal by virtue of that proceeding. . . . But for the authority conferred upon this court by that statute it would have had no power, upon reversal of the judgment of the Supreme Court, either to pronounce the appropriate judgment or remit the record to the oyer and terminer to give such judgment."

And Denio, C. J., said: "The remaining question is, whether the judgment should be reversed and the prisoner discharged, according to the former rule, or the record be remitted to the oyer and terminer to pass a legal sentence upon the conviction. This latter course is now authorized by statute. Laws 1863, c. 226, p. 406. The conviction was legal and the sentence only was erroneous. The only question is, whether the act, having been passed after the conviction, though before judgment was given in the Supreme Court, could be applied to the

case. I am of opinion that it can be applied. "The forms of judicial proceedings are under the control of the legislature." And the court accordingly, instead of ordering the prisoner to be discharged, according to the rule in force at the time the offence was committed, and even at the time of his trial and conviction, directed the record to be remitted to the Court of Oyer and Terminer with instructions to sentence him to suffer death for the crime of which he had been convicted.

The counterpart and complement of the decision in Ratzky's case are found in *Hartung v. The People*. There the prisoner had been convicted of murder and sentenced to death; but at the time the judgment was rendered the law in force at the time of the commission of the offence providing for its punishment had been repealed, and the repealing act substituted a different punishment. It was on this account adjudged to be an *ex post facto* law and void, and the judgment was reversed. 22 N. Y. 95. Subsequently the repealing act was itself repealed, and the former act in force when the offence was committed was restored. Then the prisoner was again tried, having pleaded a former conviction, but was found guilty and adjudged to suffer death in accordance with the law existing at the time the offence was committed. This judgment was thereupon reversed, and the prisoner ordered to be discharged, on the ground that the act restoring the law as it stood when the offence was committed was an *ex post facto* law, because at the time it was passed the prisoner had been adjudged to be legally free from punishment of any kind on account of her offence. 26 id. 167. The very point of the decision was, that while it was competent for the legislature to repeal the repealing act so that it could not thereafter be availed of, it could not destroy the effect of a judgment actually pronounced, while that act was in force. It is manifest that if in that case the prisoner had not been tried at all until after the law had been thus twice changed; she could not have claimed to have had the vested interest in the first repealing act, which was allowed to her in the judgment actually rendered when it was in force. It was because the subsequent law, if applied, would have changed the legal effect of that judgment, that it was adjudged to be an *ex post facto* law.

It was precisely upon this principle that the Supreme Court of North Carolina proceeded in the case of *State v. Keith*, 93 N. C. 440. There the prisoner, in custody on a charge of murder, moved for a discharge, on the ground that his offence was within the provisions of the amnesty act of 1866-67. This was admitted to be the case, but the motion was opposed on the ground that the amnesty act had been repealed. It was held that the effect of the pardon was, so far as the State was concerned, to destroy and entirely efface the previous offence, as if it had never been committed; and that to give to the repeal of the amnesty act the effect, as claimed, of reviving the offence, would make it an *ex post facto* law, making criminal that which, when it took effect, was not so, and taking from the prisoner his vested right to immunity.

But suppose in that case the provisions of the amnesty act had been conditional and not absolute, so that no one could plead its pardon unless he had taken certain formal preliminary steps to obtain the benefit of its terms, and that before the prisoner had done so the act had been repealed. Could it be claimed that in that event he had obtained a vested right to immunity, and that its repeal operated as an *ex post facto* law? Clearly not. And in reference to this case, it is also to be observed, that the fact, the legal character of which was changed by the subsequent law, was the fact of pardon, and not a fact which existed at the time of the commission of the offence. The repealing act was *ex post facto*, because it had the effect to change the legal character of the facts as they existed at the time of its passage.

In *State v. Arlin*, 39 N. H. 179, a prisoner was indicted for a robbery, which at the time of its commission was punishable by imprisonment for life; but by the same law he was entitled to have counsel assigned him by the government, process to compel the attendance of witnesses, and other similar privileges. A subsequent law mitigated the severity of the punishment and repealed the act giving these privileges. It was held that the act was not *ex post facto*, because it changed the punishment to the advantage of the prisoner, and that he was not entitled to the incidental benefits secured by the law in force when the offence was committed. The court remarked, that

by committing the offence the prisoner had not acquired a vested right to enjoy the privileges to which he would have been entitled if tried under the law subjecting him to imprisonment for life.

The rule of law in Missouri, the benefit of which is claimed for the prisoner in this proceeding, notwithstanding its repeal by the Constitution of the State before it could have been applied in his case, was established, not by statute, but by a series of judicial decisions of the Supreme Court of the State. Those decisions might at any time have been reversed by the same tribunal, and a new rule introduced, such as that actually declared by the Constitution. In that event, could it be said, with any plausibility, that the later decisions, reversing the law as previously understood, could not be applied to all subsequent proceedings in cases where, upon a plea of guilty of murder in the second degree thereafter entered and accepted, an erroneous judgment thereon had been reversed, notwithstanding, when the offence was committed, the prior decisions had been in force? Would the new rule, as introduced and applied by the later judicial decisions, be in violation of the prohibition of the Constitution of the United States against *ex post facto* laws? But the Constitution of Missouri has done no more than this.

The nature and operation of the rule are not affected by any peculiarity in the authority which establishes it. If it is not objectionable as an *ex post facto* law, when introduced by judicial decision, it is because it is not so in its nature; and, if not, it does not become so when introduced by a legislative declaration.

There are doubtless many matters of mere procedure which are of vital consequence; but in respect to them the power of Congress, as to crimes against the United States, is restrained by positive and specific limitations, carefully inserted in the organic law, prohibiting unreasonable searches and seizures, and general warrants, providing that no one shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the military service; that no person shall, for the same offence, be twice put in jeopardy of life or limb, nor be compelled to testify against himself; that every accused person shall be secured in the right to a public trial by an impartial

jury in a previously ascertained district, in which the alleged offence is charged to have been committed; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence. But these are limitations upon the legislative power of the United States, whether prospective or retrospective, and not upon that of the States; and although the constitutions of all the States probably have equivalent guarantees of individual rights, the violation of none of them by a State tribunal, under State legislation, could present a case for the exercise of supervisory jurisdiction by this court. The prohibition against bills of attainder is the only one of this class which applies to both the government of the United States and those of the States; and while a bill of attainder may be an *ex post facto* law, it is not necessarily so, as it may be merely a matter of procedure, a trial by a legislative instead of a judicial body.

But, in addition to these matters of procedure, which are specially protected against legislative change, either for the past or the future, there may be others, in which changes with a retrospective effect are forbidden by the prohibition against *ex post facto* laws. Such, we have already seen, would be laws which authorize conviction upon less evidence than was required at the time of the commission of the offence, or which altered, to the disadvantage of the accused, the nature and quantity of proof at that time required to substantiate a legal defence; or which, in other words, gave to the circumstances which constituted and attended the act a legal signification more injurious to the accused than was attached to them by the law existing at the time of the transaction.

It is doubtless quite true that it is difficult to draw the line in particular cases beyond which legislative power over remedies and procedure cannot pass without touching upon the substantial rights of the parties affected, as it is impossible to fix that boundary by any general words. The same difficulty is encountered, as the same principle applies, in determining, in civil cases, how far the legislature may modify the remedy without impairing or enlarging the obligation of contracts. Every case must be decided upon its own circumstances, as the

question continually arises and requires an answer. But it is a familiar principle, that, before rights derived under public laws have become vested in particular individuals, the State, for its own convenience and the public good, may amend or repeal the law without just cause of complaint. "The power that authorizes or proposes to give," said Woodbury, J., in *Merrill v. Sherburne*, 1 N. H. 199, 213, "may always revoke before an interest is perfected in the donee." Accordingly the heir apparent loses no legal right if, before descent cast, the law of descents is changed so as to shift the inheritance to another, however his expectations may be disappointed. And while it would be a violation of the constitutional maxim which forbids retrospective legislation inconsistent with vested rights to deprive, by a repeal of statutes of limitation, a defendant of a defence which had become perfect while they were in force; yet if, before the bar had become complete, he should be deprived of an expected defence, by an extension of time in which suit might be brought, he would have no just cause to object that he was compelled to meet the case of his adversary upon its merits.

In respect to criminal offences it is undoubtedly a maxim of natural justice, embodied in constitutional provisions, that the quality and consequences of an act shall be determined by the law in force when it is committed, and of which, therefore, the accused may be presumed to have knowledge, so that the definition of the offence, the character and degree of its punishment, and the amount and kind of evidence necessary to prove it, cannot be changed to the disadvantage of the party charged, *ex post facto*. And this equally applies to, because it includes, the matters which, existing at the time and constituting part of the transaction, affect its character, and thus form grounds of mitigation or defence; for the accused is entitled to the benefit of all the circumstances that attended his conduct, according to their legal significance, as determined at the time. All these are incidents that belong to the substance of the thing charged as a crime, and therefore come within the saving which preserves the legal character of the principal fact. But matters of possible defence, which accrue under provisions of positive law, which are arbitrary and technical, introduced for public convenience or from motives of policy,

which do not affect the substance of the accusation or defence, and form no part of the *res gestæ*, are continually subject to the legislative will, unless, in the mean time, by an actual application to the particular case, the legal condition of the accused has been actually changed. His right to maintain that *status*, when it has become once vested, is beyond the reach of subsequent law.

The present, as we have seen, is not such a case. The substance of the prisoner's defence, upon the merits, has not been touched; no vested right under the law had wrought a result upon his legal condition before its repeal. He is, therefore, in no position to invoke the constitutional prohibition, which is, by the judgment of this court, now interposed between him and the crime of which he has been convicted.

In our opinion, the judgment of the Supreme Court of Missouri should be affirmed.

BOWDEN v. JOHNSON.

1. Where the holder of shares of stock in a national bank, who is possessed of information showing that there is good ground to apprehend the failure of the bank, colludes with an irresponsible person, with the design of substituting the latter in his place, and thus escaping the individual liability imposed by the provisions of sect. 12 of the act of June 3, 1864, c. 106, and transfers his shares to such person, the transaction is a fraud on the creditors of the bank, and the liability of the transferor to them is not thereby affected.
2. A bill in equity filed by the receiver of the bank against the transferor and transferee to enforce such liability will lie where it is for discovery as well as relief, the transfer being good between the parties, and only voidable at the election of the complainant.
3. A letter of the Comptroller of the Currency, addressed to the receiver, directing him to bring suit to enforce the personal liability of every person owning stock at the time the bank suspended, is sufficient evidence that the decision of the Comptroller touching such personal liability preceded the institution of the suit. The liability bears interest from the date of the letter.
4. The decree below, dismissing the bill, was entered after a new receiver had been appointed. An appeal to this court was taken in the name of the old receiver, as the complainant, the new receiver becoming a surety in the appeal bond. In this court the new receiver was, on his motion, substituted as the complainant and appellant, without prejudice to the proceedings already had; and the motion of the appellees to dismiss the appeal was denied.

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H. H. Gearing, Chattanooga, for respondent Morgan.

Lionel R. Barrett, Jr., Tenn. Assoc. of Crim. Lawyers, Nashville, amicus curiae.

OPINION

HARBISON, Justice.

Petitioner Clarence L. Collins, Jr., was convicted of murder in the first degree in connection with the death of Merchie Ford Bacon and sentenced to death by electrocution. He was also convicted of murder in the second degree in connection with the death of Sara Gilbert Bacon and sentenced to ninety-nine years in the state penitentiary. Both convictions, including the death penalty, were affirmed by the Court of Criminal Appeals.

Certiorari was granted upon the petition of Collins, primarily in order that this Court might consider the constitutionality of the death penalty under existing state statutes. Other assignments of error were made on behalf of Collins, and we have given consideration to these. All of them were dealt with properly and adequately, however, in the opinion of the Court of Criminal Appeals, and we do not find that any of them have sufficient merit to warrant reversal of the convictions. Accordingly the conviction and sentence of the petitioner Collins in connection with the death of Mrs. Bacon are affirmed, and all of his assignments of error, other than those involving the death penalty in this state, are overruled. His

conviction of murder in the first degree of Mr. Bacon is also affirmed.

Respondent Frank Carl Morgan was convicted of murder in the first degree while in the perpetration of a burglary in Chattanooga, Tennessee on October 13, 1974. His conviction for this offense was affirmed by the Court of Criminal Appeals, but, in a divided decision, that Court held unconstitutional the Tennessee statutes imposing the death penalty. The sentence in that case was, therefore, set aside and the cause remanded for resentencing. We granted the petition of the State on the punishment issue, and the only questions before the Court in the Morgan case concern the death penalty and the proper disposition of the case if that penalty cannot validly be imposed under existing state law.

Following the decision of the United States Supreme Court in the case of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the General Assembly of Tennessee, like that of many other states, reconsidered and redrafted the state statutes providing for the death penalty. The first Tennessee statute following *Furman* was Chapter 192 of the Public Acts of 1973. This statute redefined the offense of first degree murder, and provided for a separate sentencing hearing following an adjudication of guilt. It permitted the jury to consider aggravating and mitigating circumstances, and provided for automatic review by the state Supreme Court of cases in which the death penalty was imposed.

In the case of *State v. Hailey*, 503 S.W.2d 712 (Tenn.1974), the 1973 statute was held unconstitutional under the provisions of Article II, Section 17, of the state constitution, upon the ground that its provisions embraced more than one subject, and not all of the subject matter was set forth in the title or caption.

Since the 1973 legislation was invalid, prior state law dealing with the subject of murder in the first degree was left unaffected. *State v. Dixon*, 530 S.W.2d 73 (Tenn.1975). This earlier law had been codified in Williams Tenn.Code Ann. §§ 10768 et seq., T.C.A. §§ 39-2102 et seq.

Subsequently, by Chapter 462 of the Public Acts of 1974, the General Assembly amended the definition of murder in the first degree as contained in T.C.A. § 39-2402, and provided a mandatory death penalty for all persons convicted of that offense or as accessory before the fact of that crime. This mandatory death penalty was the subject of the opinions of the Court of Criminal Appeals in the cases now under consideration.

The 1974 statute makes no provision for a separate sentencing hearing, apart from the trial in which guilt is determined, and makes no provision for consideration of aggravating or mitigating circumstances, other than such as may inhere in the definition of the offense itself. Presumably the General Assembly, by making the death penalty mandatory, sought to eliminate the imposition of that penalty in an arbitrary or capricious manner prohibited by the decision of the United States Supreme Court in *Furman*, *supra*.

On July 2, 1976 the Supreme Court of the United States rendered opinions in five cases, giving consideration to the death penalty statutes of the states of North Carolina, Florida, Louisiana, Georgia and Texas. See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and the opinions in its four companion cases.

In the cases of *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), statutes providing for mandatory sentence of death upon conviction of murder in the first degree were held to violate the Eighth and Fourteenth Amendments to the Constitution of the United States. Statutes giving to the sentencing authority "controlled discretion" in the other three states were sustained.

Subsequently, on July 6, 1976, a mandatory death penalty under the statutes of Oklahoma was also held invalid. *Williams v. Oklahoma*, 428 U.S. 907, 96 S.Ct. 3218, 49 L.Ed.2d 1215 (1976).

[1] We have carefully considered the texts of the various opinions of the Su-

preme Court of the United States, and we are of the opinion that the mandatory death penalty of the 1974 Tennessee statute here under consideration cannot be distinguished in any meaningful or significant way from the North Carolina, Louisiana and Oklahoma statutes invalidated in the cases above referred to. Accordingly, the death sentences in each of the cases under consideration must be set aside, and Section 3, Chapter 462 of the Public Acts of 1974, as codified in T.C.A. §§ 39-2405, 2406, is declared unconstitutional, for the reasons and upon the grounds stated by the United States Supreme Court in *Woodson* and *Roberts*, *supra*.

[2] Setting aside the sentences in these cases, of course, does not have the effect of invalidating the provisions of T.C.A. § 39-2402, defining the offense of murder in the first degree, or of the convictions obtained thereunder. It does have the effect of reviving the law prior to 1973, insofar as punishment is concerned. Statutes in existence prior to the adoption of Chapter 192 of the Public Acts of 1973 and prior to the adoption of Section 3, Chapter 462, of the Public Acts of 1974, provided that persons convicted of murder in the first degree

"... shall suffer death by electrocution, or be imprisoned for life or over twenty (20) years, as the jury may determine." Williams Tenn.Code Ann. § 10771, T.C.A. § 39-2405.

Prior law, originating in Chapter 5 of the Public Acts of 1919, provided that the convicting jury should fix punishment at death, but they might "if they are of opinion that there are mitigating circumstances," fix the punishment at imprisonment for life or for some period over twenty years. T.C.A. § 39-2406.

[3] The "mitigating circumstances" in the prior law were not delineated by statute, although some of them were considered in reported cases construing the statute. Nevertheless, we are of the opinion that the pre-1973 statutes, like the 1974 Act, did not prescribe sufficiently detailed procedures to accomplish "controlled discretion" by the

jury in the imposition of the death penalty, as required by the recent decisions of the United States Supreme Court above referred to. The death penalty provisions contained in them are invalid, in our opinion, under the principles announced in those cases and in *Furman v. Georgia*, *supra*.¹ For this reason, we cannot approve the suggestion made by the State, in its supplemental brief, that the prisoners in these cases and others similarly situated be given resentencing hearings to include the possibility of death sentences under the earlier Tennessee statutes.

[4] In similar cases in the past, this Court has held that the proper procedure to be followed, where the death penalty cannot validly be carried out, is for the cause to be remanded for a new sentencing hearing before a jury. The fact that punishment is fixed by a different jury from that which assessed guilt was held not to violate either constitutional or statutory rights of the accused in *Hunter v. State*, 496 S.W.2d 900 (Tenn.1972). See also *Farris v. State*, 535 S.W.2d 608 (Tenn.1976) and the analysis of the subject on petition to rehear, 535 S.W.2d at 620-621.

Accordingly these cases are remanded to the respective trial courts from which they originated for a resentencing hearing, with punishment to be fixed in each case from twenty years to life imprisonment. Costs in each case are taxed to the defendant.

COOPER, C. J., and FONES and BROCK, JJ., concur.

HENRY, J., dissents in part.

HENRY, Justice, concurring in part; dissenting in part.

I am in full accord with so much of the majority opinion as holds that the Tennessee death penalty statute is unconstitutional. This conclusion is mandated by the recent decision of the Supreme Court of the

United States as set forth in the main opinion.

I.

The only remaining questions are whether these defendants, and others similarly situated must be given (1) a new trial, or (2) a sentencing hearing, with punishment fixed at imprisonment for life or for some period over ten years (Sec. 39-2403, T.C.A.) or (3) whether this Court may properly impose a life sentence or a sentence for a term of years without remanding the case and without the consent of the state or the defendant.

This is a case of first impression in this state in that no reported decision of this Court provides a positive and direct answer. It is true that we have a line of seemingly analogous cases, but, upon analysis, the distinction is unmistakable.

The instant cases are *not* cases wherein the Court has concluded that the convicting evidence is sufficient only to sustain a lesser included offense, as in *Corlew v. State*, 181 Tenn. 220, 180 S.W.2d 900 and in a long line of cases flowing therefrom. Nor are they cases wherein the error committed only affected the sentence and not guilt or innocence as in *Farris v. State*, 535 S.W.2d 608 (Tenn.1976).

In each case the defendant was guilty of the commission of a brutal and heinous murder, with no mitigating circumstances. Each had a fair trial.

There being no direct precedent to guide us in our conclusion, our decision must be the product of a reasoned, rational and realistic approach, within the framework of controlling principles of constitutional and statutory law.

II.

It is incontestably true that a conviction of first degree murder carries with it a

of death as it exists under the statutes of Tennessee."

1. In the case of *Hunter v. State*, 496 S.W.2d 900, 904 (Tenn.1972), this Court said that the effect of *Furman* "is to render void the penalty

conviction of all lesser included offenses, ranging all the way down to simple assault.¹ As an inevitable corollary, such a conviction entails punishment ranging from death by electrocution, under the law then in effect, all the way down to a monetary penalty or confinement in the county jail.

The defendant, in such a case, has had his full constitutional right to trial by jury, and, in legal effect, has been found guilty of all offenses and subject to all sentences.

In the case of these defendants each jury had all these options. True, if they found guilt of first degree murder they could only punish by electrocution, but they were not compelled to make such a finding. They could have found either defendant guilty of murder in the second degree and fixed punishment at life or at ten years or more. And, again, such finding and punishment are necessarily included in the finding of murder in the first degree and death by electrocution.

By quirk of fate, these defendants have been convicted under an unconstitutional statute and we must nullify the sentence of death by electrocution; however, this leaves intact the conviction of second degree murder. Since the jury verdict validated any and all lesser sentences, this reduction in degree would carry with it a reduction to the next highest penalty, life imprisonment.

We are commanded by statute (Sec. 40-3409, T.C.A.) in all criminal cases to

render such judgment on the record as the law demands. (Emphasis supplied).

In my view, the law demands that these convicted murderers be dealt with in a manner commensurate with the gravity of their offenses. Neither the dictates of the law nor the commands of conscience require that we give them a second opportunity to plead their causes to a jury.

Discussing the alternatives available to the Court in the resentencing of death penalty cases, Justice McCanless, writing for

the Court in *Bowen v. State*, 488 S.W.2d 373 (Tenn.1972), stated that

it is conceivably within the power of this Court to reduce the death penalty to ninety-nine years, where a defendant is clearly and beyond a reasonable doubt guilty of a first degree murder which justifies the death penalty, which would be applied except for the unconstitutionality of the death part of the sentence. 488 S.W.2d at 377.

While, admittedly, the language quoted from *Bowen, supra*, was dictum in that case, it is uniquely appropriate in the present situation, and, in my view, is a correct statement of the law.

III.

There is a practical aspect to this matter. A sentencing hearing will require the same precise proof and trial proceedings as the original trial, plus evidence in mitigation and extenuation that was not admissible in a unitary trial where the jury was called upon to find guilt or innocence and fix punishment. Numerous first degree murder cases now pend determination in the appellate courts. To remand all of them for sentencing hearings would be an undue strain upon an already over-burdened criminal justice system, to say nothing of the tremendous cost involved.

Thirty-six (36) persons convicted of first degree murder and sentenced to death by electrocution are now on "death row" in our state penitentiary. An unknown number are in county jails throughout the state. A conservative estimate of the cost per day of a jury trial in our criminal courts would be approximately \$1,000.00. The cost to the state of these sentencing hearings will be staggering.

I fully realize that justice may not be rationed and that normally the cost factor is not a relevant consideration; however, in cases such as these where full, fair and constitutional hearings have already decid-

1. We are not concerned, in this opinion, with the duty of the trial judge in charging lesser included offenses.

ed all issues, it would be a complete waste of public funds to conduct re-trials.

Justice suffers when justice is delayed. The surest solution to the high incidence of crime in America, in my view, is sure, swift and certain punishment. Nothing degrades our criminal justice system more and creates more disrespect for the courts and its processes than the lingering delay in the disposition of criminal cases. I am unwilling to contribute to that delay.

IV.

There is yet another solution.

The Governor has the constitutional and statutory power to commute a punishment of death to imprisonment for life in the penitentiary. Sec. 40-3506, T.C.A.; *Bowen v. State*, 488 S.W.2d 373 (Tenn.1972), and his commutation of sentence is a substitution of a lesser for a greater punishment.²

Further Section 40-3506, T.C.A. provides: 40-3506. *Commutation on certificate of Supreme Court.*—The governor may, likewise, commute the punishment from death to imprisonment for life, upon the certificate of the Supreme Court, entered on the minutes of the court, that in their opinion, there were extenuating circumstances attending the case, and that the punishment ought to be commuted.

In view of the unique developments surrounding these cases in particular and the death penalty in Tennessee in general, this Court could certify to the Governor the existence of extenuating circumstances. Admittedly this is a liberal—and perhaps a strained interpretation of the legislative intent, but I feel it justified under the unique circumstances of this case.

2. It must be borne in mind that the recent decisions of the Supreme Court of the United States did not *ipso facto* operate to void these sentences. They stand until this Court, applying the principles established by the Supreme Court of the United States, invalidates them. After the commutation these sentences stand on the same footing as if they had been pronounced in the original trial for the commuted term. 488 S.W.2d at 375-76. After commutation the original judgments stand as valid and no change is necessary. This follows from the

fact that the commutation does not affect the judgment, but merely mitigates the punishment. Therefore a commutation merely renders so much of the original judgment as adjudges the death penalty a nullity, leaving the remainder intact. 488 S.W.2d at 378. Review in this Court would be limited to guilt or innocence of first degree murder.

Moreover, this statute is not binding upon this Court and in no sense entrenches upon the Court's power, duty or obligation to convey to the Governor its views in appropriate cases. We, therefore, are not limited to the certificate as set forth in the statute, but, independent of the statute, in a proper case, may make our determination that executive commutation is appropriate, and communicate this determination to the Governor.

Therefore, pursuant to, and independent of the statute, by my signature hereon, I do hereby certify to His Excellency, The Honorable Ray Blanton, Governor of the State of Tennessee, that in my opinion, there are extenuating circumstances in these cases, and that the punishments ought to be commuted to life imprisonment. This certification should be deemed and treated as having been made in all cases wherein the same constitutional problems have arisen or may arise.

In making this certification, I am not unmindful of the doctrine of separation of powers. This wholesome doctrine, however, does not preclude cooperation, coordination and communication among the three coordinate branches of the state government on matters of vital public concern.

In summary, I would reduce these sentences to life imprisonment,³ thereby "render(ing) such judgment as the law demands." In the alternative, I would uphold the convictions, certify to the Governor the existence of extenuating circumstances, wait a reasonable length of time for the Governor's official response, and should he fail to act, would reduce the sentences in the manner and to the extent aforesaid.

3. Life imprisonment is the second most severe form of punishment under Tennessee Law.

Other questions are raised in the petition for rehearing which were not involved in these cases and which would, in our opinion, be inappropriate for us to consider at this time.

The result is that the judgments of the respective trial courts are affirmed, as commuted to life imprisonment.

PONES, J., concurs.

HENRY, J., files concurring opinion.

COOPER, C. J., dissents.

BROCK, J., files dissenting opinion.

HENRY, Justice, concurring.

I concur in the opinion prepared for the Court by Mr. Justice Harbison. I particularly applaud the following language:

In these cases each jury was instructed as to first degree murder, second degree murder, and all lesser included offenses. The two juries had the opportunity and authority to impose a lesser sentence but declined to do so. Since the defendants received the maximum penalty of death at the hands of juries, there is nothing in our statutory or constitutional law or the decisions of this Court requiring that they be given a second jury trial as to punishment under the circumstances presented here.

This is precisely what I pointed out in my dissent from the first opinion of the Court in this case.

Specifically, I reasoned:

It is incontestably true that a conviction of first degree murder carries with it a conviction of all lesser included offenses, ranging all the way down to simple assault. As an inevitable corollary, such a conviction entails punishment ranging from death by electrocution, under the law then in effect, all the way down to a monetary penalty or confinement in the county jail.

The defendant, in such a case, has had his full constitutional right to trial by jury, and, in legal effect, has been found guilty of all offenses and subject to all sentences.

In the case of these defendants each jury had all these options. True, if they found guilt of first degree murder they could only punish by electrocution, but they were not compelled to make such a finding. They could have found either defendant guilty of murder in the second degree and fixed punishment at life or at ten years or more. And, again, such finding and punishment are necessarily included in the finding of murder in the first degree and death by electrocution.

At the time I prepared my Separate Opinion, I could find no precedent, and, finding none had no choice but to proceed upon the basis of what I considered to be irrefutable logic. Fortunately, with the passage of time has come precedent from other jurisdictions.

Some three weeks after the main opinion and the dissent were filed in the instant case the Supreme Court of Nevada released its opinion in *Smith v. State*, 93 Nev. Advance Opinion 35, 560 P.2d 158 (Feb. 17, 1977). The Nevada mandatory death penalty is incorporated in NRS 200.030, which defines "capital murder" and provides that it "shall be punished by death." In *Smith* the Nevada Court, pursuant to the mandate of *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), declared the Nevada death penalty to be unconstitutional, and imposed "life imprisonment without possibility of parole."

The Nevada Court, in *Anderson v. State*, 528 P.2d 1023 (Nev.1974), instructs us that after the decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), "life imprisonment without the possibility of parole became the maximum sentence that could be imposed in Nevada against a person convicted of first degree murder." Therefore, the Court held:

The district judge was authorized to re-sentence the appellant and invoke the penalty of life without possibility of parole, it being the only lawful penalty which could have been entered upon the

conviction and finding of the jury that Anderson should receive the maximum sentence permitted by law. (Emphasis supplied). 528 P.2d at 1025.

An even more significant case is *Boyd v. Commonwealth of Kentucky*, 550 S.W.2d 507 (opinion filed March 11, 1977), wherein the Kentucky Supreme Court held that state's mandatory death penalty to be unconstitutional,¹ and reduced the punishment to life imprisonment. Pertinent to the case at bar is the following:

The jury found Boyd guilty of the intentional multiple murders of Gilliam and Howard. In order for the jury to reach this result it was necessary that it find Boyd guilty of the intentional murders of both Gilliam and Howard under aggravated conditions and reject all possibilities of intentional simple murder or manslaughter convictions.

The jury chose to convict Boyd of the most serious and aggravated offense and invoke the ultimate punishment of death. It deliberately rejected the opportunity to extend mercy by declining to convict Boyd of simple intentional murder or manslaughter in the first degree. It was clearly the intention of the jury to impose the maximum punishment legally permissible. The maximum punishment constitutionally permissible under Kentucky's 1974 penal code is life imprisonment. Unless the verdict of the jury is to be completely frustrated, it is this punishment which must be imposed upon Boyd for each of the two murders of which he stands convicted.

Thus, the Kentucky Court, under statutory provisions having precisely the same effect as Sec. 39-2405, 2406, T.C.A., followed the identical procedure heretofore suggested in my dissent and now adopted by the majority opinion.

It would be unthinkable for this Court to hold that the Governor of Tennessee does not have the power to issue a commutation in these cases. I, therefore, agree with the

majority opinion that he acted "within the constitutional power of the executive, and we cannot refuse to recognize its validity." However, it is not necessary that we reach this issue. All that is necessary is that we recede from the views expressed in the original opinion and reduce these sentences to life imprisonment.

BROCK, Justice, dissenting.

I dissent. On January 24, 1977, this Court announced its opinion and judgment in these cases, declaring unconstitutional Section 3 of Chapter 462 of the Public Acts of 1974, which mandated punishment by death for the crime of murder in the first degree, vacating the death sentences of defendants Collins and Morgan and remanding their cases to the trial courts for new trials limited to the ascertainment of proper punishment by a jury and the imposition of new sentences by the trial judge, such sentences to be from 20 years to life imprisonment, as provided by the appropriate statutes.

Thereafter, the State filed a petition to rehear asserting that after this Court had vacated the death sentences in these causes, the Governor "commuted" the sentences from death by electrocution to imprisonment for life. Now, in response to the petition to rehear, the majority of the Court is reversing our original determination that defendants Collins and Morgan were entitled to have their punishment assessed by a jury and new sentences imposed by the trial courts and, instead, is affirming the respective judgments of the trial courts "as commuted to life imprisonment." In my opinion, this reversal deprives the defendants of valuable rights to have their punishment determined by the courts.

I

I deem it appropriate and advisable to spell out the reasons underlying our original determination that this Court did not have

1. Sec. 507.020, KRS defines murder and makes it a capital offense in cases involving multiple murders (as was the case in *Boyd*). Sec. 532-

630 KRS provides for a mandatory death penalty.

lawful authority following the vacation of the death sentences imposed upon the defendants to determine appropriate punishment for the defendants, but, instead, was required by the law of this State to remand their cases to the trial court for a determination of appropriate punishment and new sentences by the jury and trial judge.

There is precedent in Tennessee for adjustment of a sentence at the appellate level under certain limited circumstances. In *Corlew v. State*, 181 Tenn. 220, 180 S.W.2d 900 (1944), a conviction for grand larceny was set aside for failure of the State to prove the value of the property taken. It was, nevertheless, clear from the verdict that the jury believed the State's proof of the elements of petit larceny. Rather than ordering a new trial, the Court imposed the minimum sentence for petit larceny and gave the State the option of accepting the reduced sentence or retrying the defendant to seek a higher penalty. See also *Forsha v. State*, 183 Tenn. 604, 194 S.W.2d 463 (1946).

The case of *Beaver v. State*, 475 S.W.2d 557 (Tenn.Cr.App.1971) posed a different, but related, problem. Veniremen who expressed conscientious objections to capital punishment were excluded from the jury in violation of the rule of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The Court of Criminal Appeals held that the error did not vitiate the verdict of guilt but affected only the validity of the death sentence imposed. Accordingly, the sentence was reduced to the minimum punishment of confinement in the penitentiary for twenty years and one day, subject to acceptance by the State.

There is, however, no Tennessee authority for reducing a sentence to the maximum penalty authorized by statute. To the contrary, the rule, without exception, has been that if the punishment fixed by the verdict is either below the minimum or above the maximum penalty prescribed by statute, there is no remedy but to reverse and remand for a new trial, *McDougal v. State*, 64 Tenn. 660 (1875); *Cowan v. State*, 117 Tenn. 247, 96 S.W. 973 (1906); *Jamison v. State*,

220 Tenn. 220, 416 S.W.2d 768 (1967); *Corlew v. State*, *supra*; on the issue of guilt as well as punishment, *Gohlston v. State*, 143 Tenn. 126, 223 S.W. 839 (1920). This is true even in misdemeanor cases, if the defendant has demanded that the jury fix the punishment. *Van Pelt v. State*, 193 Tenn. 436, 246 S.W.2d 87 (1952); *Aldridge v. State*, 4 Tenn. Cr.App. 254, 470 S.W.2d 42 (1971).

Since the death penalty statutes of 1973 and 1974 have been held invalid, § 10772 of the Code of 1932, without its capital sentencing provision, is "revived." *State v. Dixon*, 530 S.W.2d 73 (Tenn.1975). Therefore, murder in the first degree may be punished by any term in the penitentiary greater than twenty years. In *Hunter v. State*, 496 S.W.2d 900 (Tenn.1972), this Court held that *precisely because a variety of punishments is available*, this Court may not itself correct the sentence but must remand for sentencing by a jury. Although the defendant does not have a constitutional right to have the jury determine punishment, he does have a statutory right to that effect. *Gohlston v. State*, *supra*. So does the State. T.C.A. § 39-2406; *Corlew v. State*, *supra*; *State v. Odom*, 200 Tenn. 231, 292 S.W.2d 23 (1956); T.C.A. § 40-2707; *West v. State*, 140 Tenn. 358, 204 S.W. 994 (1918), dealing with former law. In *Gohlston*, the Court said that the "Act clearly vests the power to fix the punishment in such cases in the jury" which has the "exclusive power and authority to fix the punishment of the defendants in cases where they have been convicted of murder in the first degree, and [jury sentencing] is mandatory". 143 Tenn. at 132, 223 S.W. at 840.

In the *Corlew* case, *supra*, the Court relied on the obvious proposition that the defendant cannot complain that he is deprived of any rights when he has been found guilty by a jury and receives the least severe sentence a jury could have imposed, observing cautiously that "the rule should never be applied unless it is plain, beyond question, that the action taken is for the benefit of the defendant" 180 S.W.2d at 902. In the cases at bar, it is sheer speculation to conclude that the jury

which imposed the death penalty would have chosen life imprisonment had the death penalty been unavailable at the time of trial.

It appears to me that the premise of such a speculation is not correct. The law by which these cases were tried and the jurors instructed did not give the jurors any power to withhold the death penalty except by violating their oaths and refusing to return a verdict of first degree murder even though they believed the State's proof. It is for that reason that it is unconstitutional under the decision of the U.S. Supreme Court in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

It is true that some other courts of last resort, having found their particular death penalty statutes to be unconstitutional, have imposed sentences of life imprisonment at the appellate level. *Swain v. State*, 290 Ala. 123, 274 So.2d 305 (1973); *Anderson v. State*, 528 P.2d 1023 (Nev. 1974). But, they were administering statutes quite different from ours. That would appear to be a proper action if life imprisonment were the only alternative to capital punishment, as is true in Nevada, where the *Anderson* case arose. N.R.S. 200.030.

The *Swain* case was decided under a statute similar to the "revived" Tennessee statute. The Alabama court could not remand for a new trial on the issue of punishment because there was no statutory authority for bifurcated trials, and it was feared that the administrative problems for the trial court would prove unmanageable. This has not been regarded as a problem in Tennessee. See *Huffman v. State*, 200 Tenn. 487, 292 S.W.2d 738 (1956); *Hunter v. State*, 496 S.W.2d 909 (Tenn.1972). But the crucial distinction between the cases at bar and *Swain* is that there the jury had a choice and selected the penalty of death, whereas, in these cases the jury had no option. Since it elected the harshest punishment available, the court in *Swain* felt warranted in

selecting the next most severe valid penalty after the death penalty was declared unconstitutional. In the cases at bar, the jury simply found the defendant guilty of first degree murder upon the evidence; the punishment followed automatically.

Bowen v. State, 488 S.W.2d 373 (Tenn. 1972) is relied upon for its *dictum* suggesting that this Court has power to follow the Alabama precedent. But, *Bowen* is bad *dictum* because the same consideration that distinguishes *Swain* distinguishes *Bowen*, namely, that the jury selected the punishment as it was required to do under the law in effect prior to 1973.

Considering the foregoing authorities, I was convinced when we pronounced our original decision that these cases must be remanded for resentencing hearings so that the jury and trial judge may fix a lawful punishment "at imprisonment in the penitentiary for life, or for some period over twenty years." T.C.A., § 39-2406. I adhere to that conclusion.

II

The reason given by the majority for granting the petition to rehear and reversing the original judgment of this Court is that the Governor has since intervened and "commuted" the punishment of the defendants from death by electrocution to life imprisonment. The majority considers these "commutations" to be valid exercises of the executive power and, thus, effective to fix the punishment of the defendants at life imprisonment. I cannot agree. In my view, the Governor's actions were premature and unauthorized by law, and constitute an unwarranted interference with the judicial process.

The power of the Governor is granted by Art. III, Sec. 6, Constitution of Tennessee,¹ as follows:

"He shall have power to grant reprieves and pardons, after conviction, except in cases of impeachment."

1. T.C.A., §§ 40-3501-40-3508, which purport to provide for commutation in certain instances not applicable to these cases.

No power to grant commutations of sentences is expressly mentioned, but it has long been recognized that such power is to be implied from the grant of the greater power "to pardon. See 67 C.J.S. Pardons § 15(2), p. 584.

A pardon is an executive act of grace which exempts a person from the punishment the law inflicts for a crime he has committed; a commutation of sentence is the reduction of a lawful punishment to which a person has been condemned to a less severe lawful punishment. *People v. Frost*, 133 App.Div. 179, 117 N.Y.S. 524 (1909).

The difficulty with the "commutations" in these cases, in my view, is that they were prematurely issued and are given an effect not intended by the drafters of our Constitution. It is my firm opinion that no executive act of clemency, whether it be a pardon, reprieve or commutation, can be given the effect of depriving the defendant of a vested legal right; in these cases, the right to have a jury and trial judge determine the term of imprisonment which, possibly, could be as short as twenty years. Nevertheless, such is the effect of these "commutations" as approved by the majority. On January 27, 1977, the defendants had the right to go before a jury and argue that their punishment be fixed at no more than twenty years imprisonment; on January 28, 1977, they were deprived of that right by the Governor and by him sentenced to imprisonment for life. In my view, such a result is not authorized by Art. III, Sec. 6, Constitution of Tennessee, or by any other law. Moreover, such action is, in my view, in plain violation of Art. I, Sec. 8, Constitution of Tennessee, which mandates that:

"No man shall be taken or imprisoned . . . but by the judgment of his peers or the law of the land."

This provision of our fundamental law guarantees that both guilt and punishment must be determined by the courts, not the Governor. The Governor has no power to impose sentence; he has power only to diminish the punishment provided by a sentence imposed by the courts.

The power to commute a sentence can never properly be exercised until after the judgment of the courts has become final; until that time there is no sentence to be commuted. Any "commutation" before that time necessarily is an impermissible interference with the judicial process.

A pardon may be granted at any time after conviction and, even when granted before the judgment of the courts is final, does not unlawfully interfere with the judicial process. This is so because the pardon lawfully obliterates both guilt and punishment, without depriving the defendant of any vested right, but a commutation is different.

The majority cites as authority for its action *Rose v. Hodges*, 423 U.S. 19, 96 S.Ct. 175, 46 L.Ed.2d 162 (1975); *Bowen v. State*, *supra*; and *Hodges v. State*, 491 S.W.2d 624 (Tenn.Cr.App.1972). In my opinion, *Rose* is not in point, but I agree that *Bowen* and *Hodges* are apposite; so are *Whan v. State*, 485 S.W.2d 275 (Tex.Cr.App.1972) and *Stanley v. State*, 490 S.W.2d 828 (Tex.Cr.App. 1972). See also *State v. Hill*, 279 N.C. 371, 183 S.E.2d 97 (1971).

Although apposite, I cannot follow the decisions in *Bowen*, *Whan* and *Stanley* because they sanction what I consider to be a perversion of the power to commute a sentence. What kind of "commutation" is it that fixes the punishment at the maximum permitted by law, that is fervently advocated by the prosecution and just as vigorously opposed by the defendant, that interferes with the judicial process before it is finished and deprives a defendant of his legal right to go before a jury and seek a sentence less than that fixed in the "commutation"? Surely, the power to "grant reprieves and pardons, after conviction, . . ." does not contemplate such "clemency." I cannot follow precedent which would lead me to deprive a defendant of his statutory and constitutional rights.

It is true that the situation in *Hodges v. State*, *supra*, was virtually identical to that in the cases at bar insofar as the question of "commutation" is concerned. Subsequent to the Supreme Court's decision in *Furman*

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO,

Respondent,

v.

THOMAS EUGENE CREECH,

Appellant.

Supreme Court No. 12224

BRIEF OF RESPONDENT

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Shoshone

HONORABLE J. RAY DURTSCHI
District Judge

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FILED

FEB 22 1977

SUPREME COURT OF IDAHO
R. H. YOUNG, CLERK

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO,)	
)	
Respondent,)	
)	
v.)	Supreme Court No. 12224
)	
THOMAS EUGENE CREECH,)	
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STATEMENT OF THE CASE

This appeal does not involve the facts surrounding the offenses committed by the Defendant and it need only be noted here that the Defendant was convicted by a jury of two counts of murder in the first degree and sentenced to death pursuant to the statutes challenged by Appellant in this appeal.

The State does, however, call attention to the fact that undisputed evidence received at trial shows that Appellant is a mass murderer whose vicious propensities have been wholly unrestrained by any civilized scruples whatever. Inasmuch as the State will argue that Appellant should be resentenced, we need not review the details of his crimes. It is sufficient to say that if Appellant is resentenced, there will be abundant reason, consistent with current capital sentencing standards to again sentence Appellant to death.

POINTS AND AUTHORITIES

I.

SENTENCING PROCEDURES ARE WITHIN JUDICIAL AND NOT LEGISLATIVE AUTHORITY.

State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971)

REW Const. Co. v. District Court, 88 Idaho 426, 400 P.2d 390 (1965)

II.

THE METHOD OF ADMINISTERING THE LEGISLATIVE POLICY APPROVING THE DEATH PENALTY IS A PROCEDURAL MATTER.

Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 85 L.Ed. 479 (1941)

Sims v. United Pacific Ins. Co., 51 F.Supp. 433 (D.Idaho E.D. 1943)

Williams v. New York, 337 U.S. 241, 93 L.Ed. 1337 (1949)

III.

ARBITRARINESS AND UNBRIDLED JURY DISCRETION IN THE IMPOSITION OF CAPITAL SENTENCES ARE NOT CONSTITUTIONALLY PERMISSIBLE.

Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346 (1972)

Gregg v. Georgia, ___ U.S. ___, 49 L.Ed.2d 878 (1976)

IV.

IDAHO LAW DOES NOT LEAVE SENTENCING TO THE JURY.

Idaho Code, §18-108

V.

BECAUSE THERE IS A PREFERENCE FOR SENTENCING BY AN EXPERIENCED TRIAL JUDGE, THE IDAHO SENTENCING PROCEDURE STANDS ON A BETTER FOOTING THAN THE PROCEDURES WHICH HAVE BEEN DISALLOWED.

Gregg v. Georgia, supra

VI.

THE DEATH PENALTY IS NOT A FORM OF PUNISHMENT THAT MAY NEVER BE IMPOSED, REGARDLESS OF THE CIRCUMSTANCES OF THE OFFENSE OR THE CHARACTER OF THE OFFENDER.

Gregg v. Georgia, supra

VII.

BEFORE A DEATH SENTENCE MAY BE CARRIED OUT, FOUR PROCEDURAL CONDITIONS ARE CONSTITUTIONALLY MANDATED: THERE MUST BE SOME DISCRETION AVAILABLE TO THE COURT OR THE JURY; DISCRETION TO IMPOSE THE DEATH PENALTY MUST BE GUIDED AND NARROWED BY THE IDENTIFICATION OF AGGRAVATING FACTORS; MITIGATING FACTORS AND RELEVANT FACTS ABOUT THE OFFENDER MUST BE TAKEN INTO CONSIDERATION; MEANINGFUL APPELLATE REVIEW MUST BE PROVIDED TO GUARD AGAINST THE ARBITRARY IMPOSITION OF THE DEATH PENALTY.

Gregg v. Georgia, supra

Jurek v. Texas, ___ U.S. ___, 49 L.Ed.2d 929 (1976)

Proffitt v. Florida, ___ U.S. ___, 49 L.Ed.2d 913 (1976)

Roberts v. Louisiana, ___ U.S. ___, 49 L.Ed.2d 974 (1976)

Woodson v. North Carolina, ___ U.S. ___, 49 L.Ed.2d 944 (1976)

VIII.

IT IS THE DUTY OF A REVIEWING COURT TO UPHOLD THE CONSTITUTIONALITY OF A STATUTE BY CONSTRUCTION AND TO AFFIRMATIVELY SEEK SUCH A CONSTRUCTION.

Leonardson v. Moon, 92 Idaho 796, 451 P.2d 542 (1969)

United States v. National Dairy Products Corp. et al., 372 U.S. 29, 9 L.Ed.2d 561 (1963)

Sully v. American National Bank, 178 U.S. 290, 44 L.Ed. 1072 (1900)

Welsh v. United States, 398 U.S. 333, 26 L.Ed.2d 308 (1970)

IX.

LEGISLATIVE INTENT IS THE PRINCIPAL AIM OF STATUTORY CONSTRUCTION.

Willard v. First Security Bank of Idaho, 206
P.2d 770, 69 Idaho 265 (1949)

X.

THE MANDATORY DEATH PENALTY ENACTED BY THE STATE LEGISLATURE AND CODIFIED AS IDAHO CODE, SECTION 18-4004, WAS AN ATTEMPT TO ADDRESS THE CONCERNS EXPRESSED IN FURMAN V. GEORGIA.

Gregg v. Georgia, *supra*

Woodson v. North Carolina, 49 L.Ed.2d at 957

XI.

THE INTENT OF THE IDAHO LEGISLATURE IN ENACTING 18-4004 WAS TO RETAIN THE DEATH PENALTY IN CONSTITUTIONAL FORM; LEGISLATIVE INTENT IS TO BE LEARNED BY CONSIDERING THE CONDITIONS WHICH GAVE RISE TO THE LEGISLATION AND THE PURPOSES FOR ITS ENACTMENT.

Noble v. Glenns Ferry Bank, Ltd., 91 Idaho 364,
421 P.2d 444 (1966)

Messenger v. Burns, 86 Idaho 26, 382 P.2d 913 (1963)

Perkins v. Lenora Rural High School, Etc., 237
P.2d 228 (Kan. 1951)

XII.

SECTION 18-4004, PROVIDING FOR THE DEATH PENALTY, SHOULD BE READ AS PERMISSIVE WHEN READ IN CONJUNCTION WITH IDAHO CODE, 18-108, WHICH PROVIDES THAT THE COURT SHALL DETERMINE THE SENTENCE AND IDAHO CODE, 19-2515, WHICH PROVIDES FOR THE TAKING OF EVIDENCE IN MITIGATION AND AGGRAVATION; APPARENTLY MANDATORY STATUTES SHOULD BE CONSTRUED AS PERMISSIVE WHEN NECESSARY TO PROMOTE THE INTENT OF THE LEGISLATURE.

Hollingsworth v. Koelsch, 76 Idaho 203, 280
P.2d 415 (1955)

In re Mitchell's Estate, 123 P.2d 503 (Cal. 1942)

Escoe v. Zerbst, 295 U.S. 490, 79 L.Ed. 1566 (1935)

Pulcifer v. Alameda County et al., 175 P.2d 1
(Cal. 1946)

XIII.

IDAHO LAW RECOGNIZES AN INHERENT POWER IN THE JUDICIARY TO EXERCISE DISCRETION IN SENTENCING.

State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971)

XIV.

IDAHO LAW CONTAINS PROVISION FOR THE FINDING OF AGGRAVATING FACTORS AS A PREREQUISITE TO IMPOSITION OF THE SENTENCE OF DEATH.

State v. Snowden, 79 Idaho 266, 313 P.2d 706 (1957)

XV.

THE AGGRAVATING FACTORS SET FORTH IN SNOWDEN COINCIDE WITH FACTORS IDENTIFIED IN THE CASES APPROVING IMPOSITION OF THE DEATH PENALTY.

Gregg v. Georgia, supra

XVI.

MITIGATING EVIDENCE MAY ALSO BE PRESENTED UNDER IDAHO LAW PRIOR TO IMPOSITION OF A DEATH SENTENCE.

Idaho Code, §19-2515

State v. Owen, 73 Idaho 394 (1953)

XVII.

IDAHO LAW PROVIDES FOR NON-DISCRETIONARY APPEAL AND ANY DEFENDANT SENTENCED TO DEATH HAS A RIGHT TO HAVE HIS CASE HEARD ON REVIEW.

Idaho Code, §19-2803

State v. French, 95 Idaho 853 522 P.2d 61 (1977)

State v. Cornwall, 95 Idaho 680, 518 P.2d 863 (1974)

XVIII.

THIS COURT IS ENTITLED TO IMPOSE A LIMITING CONSTRUCTION ON THE IDAHO STATUTES IN ORDER TO REQUIRE THAT THEY BE APPLIED CONSISTENTLY WITH THE CONSTITUTIONAL MANDATE.

Mortenson v. United States, 322 U.S. 369, 88 L.Ed. 1331 (1944)

New York ex rel Hatch v. Reardon, 204 U.S. 152, 51 L.Ed. 415 (1907)

Barrows v. Jackson, 346 U.S. 249, 97 L.Ed. 1586 (1953)

XIX.

THE APPELLANT WOULD HAVE NO STANDING TO COMPLAIN OF A CONSTITUTIONAL VIOLATION, IF THE CONSTITUTIONAL GUIDELINES FOR IMPOSITION OF THE DEATH PENALTY WERE COMPLIED WITH IN SENTENCING APPELLANT.

New York ex rel Hatch v. Reardon, supra

Mortenson v. United States, supra

Barrows v. Jackson, supra

XX.

THE POWER OF THE STATE APPEALS COURT TO CONSTRUE ITS OWN STATUTES IN A CONSTITUTIONAL MANNER HAS BEEN FREQUENTLY RECOGNIZED BY THE UNITED STATES SUPREME COURT.

Georgia R. & Electric Co. v. Decatur, 176 SE 494, rev'd 295 U.S. 165, 79 L.Ed. 1365, reconstrued 182 SE 32, aff'd 297 U.S. 620, 80 L.Ed. 925

United States v. Raines, 362 U.S. 17, 4 L.Ed.2d 524 (1960)

United States v. National Dairy Products Corp., et al., 372 U.S. 29, 9 L.Ed.2d 561 (1963)

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XXI.

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Boulden v. Holman, 394 U.S. 478, 22 L.Ed.2d 433 (1969)

In re Anderson, 447 P.2d 117 (Cal. 1968)

INTRODUCTION

It cannot be too strongly emphasized that the issues of this case cannot properly be resolved by resort to the familiar generality that an unconstitutional penal statute creates no prohibition which can be enforced. Those cases in the criminal law where that maxim is appropriate are almost always those in which the statute found to be unconstitutional is one which purports to define a punishable offense.

However, criminal statutes are of two kinds--those which define offenses and those which prescribe penal consequences. Statutes prescribing consequences may be further reduced according to function. Hence, Idaho Code, §18-4004, contains both an announcement of legislative policy and a procedure for administering the policy. The "policy" element of the statute encompasses only the decision that the penalty of death is an acceptable consequence for the crime of murder in the first degree. The other feature of the statute, which seemingly provides that the death penalty "shall" be imposed for murder in the first degree, is also an expression of policy, but not a solely legislative policy inasmuch as it merely states the procedure for determining how the death sentencing decision shall be made. See State v. McCoy, 94 Idaho 236 (1971). The two elements are severable. As we will argue herein, the legislative decision to retain the death penalty is responsive to the view of contemporary society that

the death penalty serves a valid purpose, while the apparently mandatory aspect of the statute reflects only the legislative intent that the penalty be administered in a constitutional manner. This point is to be discussed at greater length in the following pages.

The Supreme Court of the United States focused its attention on the two aspects of capital penalty statutes in the cases decided in 1976. The Court found that the legislative policy judgment approving the death penalty is not offensive to the cruel and unusual punishment clause of the United States Constitution. Thus, the Appellant's frequent references to the penalty for first degree murder as being "unconstitutional" are ill-advised. Secondly, the Court considered the procedures for administering the death penalty and concluded that this extreme sanction is cruel and unusual if imposed in an arbitrary and capricious fashion. Only the procedure for administering the death penalty is at issue in this case.

With this preface, it is the State's purpose to suggest that the deficiencies of the Idaho statute, if there are any, are remediable by exercise of the sentencing power which rests with the judiciary. State v. McCoy, supra. It is necessary, in this connection, to discuss several judicial powers and duties, and we summarize here, leaving more expansive discussion of the State's arguments to follow.

First, the judiciary has the inherent power to exercise discretion in sentencing, a circumstance which contradicts the claim that Idaho has an illegal mandatory sentencing procedure in capital cases.

Secondly, the Court has the power to authoritatively construe a sentencing statute so that the procedure for sentencing a defendant guards against freakish imposition of the death penalty. This power is a correlative of the duty to construe statutes, whenever possible, in a constitutional manner and in a manner which gives effect to legislative intent. The Court's responsibility for statutory construction operates in two distinct areas as far as the instant case is concerned. Existing Idaho statutes and case law, construed together, make up a constitutionally acceptable capital sentencing scheme. In addition, the Court may properly incorporate the new constitutional guidelines as part of Idaho sentencing procedure.

Third, the Court has the power to govern procedure in Idaho courts. In this case, the power of the Court to set down correct procedural guidelines for sentencing the defendant overlaps the Court's responsibility for statutory construction inasmuch as the statutes to be construed are concerned with sentencing procedures.

Lastly, the judiciary has the power to resentence in order to correct sentencing deficiencies. The State recognizes that the sentencing judge believed that he was not empowered to exercise discretion in sentencing Appellant, and therefore did not make the

necessary findings. However, the State contends that the Appellant may be resentenced to death if the district court follows the sentencing procedures which we will discuss.

THE JUDICIAL POWER TO CONTROL PROCEDURE

It can be anticipated that the question will be asked whether the State seeks to have the Court to rewrite the statute, thus infringing on the legislative function. Thus it is important to take account of the distinction between "procedure" and "substantive law," because procedure is a matter of judicial concern.

Being concerned with the "cruel and unusual punishment" clause, the Supreme Court did not discuss procedural due process in Gregg v. Georgia and its companion cases. Here, however, it must be assumed that the Court, in those cases, interpreted the Constitution to create a substantive right to be free from arbitrariness and capriciousness in the imposition of the penalty of death. The Appellant is thus entitled to the benefit of a sentencing procedure which assures him of that right, but no right has been identified by which the Appellant is insulated from potential imposition of the death penalty.

It is therefore clear that the means of assuring that Appellant's substantive right to be free from arbitrariness in the imposition of the death penalty is a matter of procedure and, for that reason, subject to judicial control. R.E.W. Const. Co. v. District Court, 88 Idaho 426, 400 P.2d 390 (1965).

Procedure is

. . the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 85 L.Ed. 479, 485 (1941); Sims v. United Pacific Ins. Co., 51 F.Supp. 433 (D.Idaho E.D. 1943)

The Appellant will have received all that he is constitutionally entitled to receive if this Court remands this case for resentencing according to present sentencing standards. No valid question is raised about the fairness of Appellant's conviction and this case is concerned only with the correct procedure for imposing sentence. While the Court could not now, by construction correct a fatal statutory deficiency affecting the fairness of Appellant's trial, sentencing procedures stand on a different footing. See Williams v. New York, 337 U.S. 241, 93 L.Ed. 1337 (1949).

We proceed next to the Idaho statutes and the cases which bear upon Appellant's claims.

IDAHO CODE, §18-4004 AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE

Section 18-4004, Idaho Code, provides that "every person guilty of murder in the first degree shall suffer death. . . ." Appellant attacks this statutory provision, claiming that it is violative of the Eighth Amendment to the Constitution of the United States.¹

¹ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This case follows upon a history of several years during which the United States Supreme Court and the legislatures of a majority of states have considered the death penalty as it relates to the "cruel and unusual punishment" prohibition of the Eighth Amendment. In 1972, the Supreme Court decided Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346 (1972). In Furman:

Four justices would have held that capital punishment is not unconstitutional per se; two justices would have reached the opposite conclusion; and three justices, while agreeing that the statutes then before the court were invalid as applied, left open the question whether such punishment may ever be imposed. . . ." Gregg v. Georgia, 49 L.Ed.2d at 872.

Whatever uncertainty may have arisen from the diverging views of the several members of the Court, there was general agreement following Furman that arbitrariness and unbridled jury discretion in the imposition of capital punishment are not constitutionally permissible.

. . . Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. . . . Gregg v. Georgia, supra, 49 L.Ed.2d at 883

The legislatures of at least 35 states responded to the Furman decision by specifying limited circumstances under which the death penalty could be imposed or by making the death penalty mandatory for certain crimes. Gregg v. Georgia, 49 L.Ed.2d at 878. The Supreme Court has taken note of these developments and has observed that

. . . all of the post-Furman statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people. Gregg v. Georgia, 49 L.Ed.2d at 879

The most recent chapter in the history of capital punishment litigation in the Supreme Court was written in five decisions released by the Court in July, 1976. Gregg v. Georgia, supra; Jurek v. Texas, ___ U.S. ___, 49 L.Ed.2d 929 (1976); Proffitt v. Florida, ___ U.S. ___, 49 L.Ed.2d 913 (1976); Roberts v. Louisiana, ___ U.S. ___, 49 L.Ed.2d 974 (1976); and Woodson v. North Carolina, ___ U.S. ___, 49 L.Ed.2d 944 (1976). In the 1976 decisions, the Court further clarified the constitutional requisites for imposition of the death penalty.

Appellant's constitutional attack on the Idaho sentencing statute is based on the foregoing decisions and is founded on asserted defects in three areas. It is contended that:

1. No sentencing standards to narrow the discretion of the jury are set forth in the statute;
2. The statute contains no provision for meaningful appellate review of a death sentence; and
3. The statute contains no provision for a separate sentencing proceeding to consider aggravating and mitigating factors.

The Respondent disagrees with the theory that Appellant may not be sentenced to death. The State contends that Appellant may be resentenced and a capital penalty imposed pursuant to the recently announced constitutional guidelines. The State further

contends that the constitutional standards recently identified by the United States Supreme Court already exist in Idaho law.

THE JURY SENTENCING DISTINCTION

Before going on to discuss the sentencing standards of Gregg v. Georgia, and its companion cases, we note that the defect present in Furman v. Georgia, and at issue in all of the cases decided in 1976,--uncontrolled sentencing discretion by the jury--is not present here. Idaho law leaves sentencing to the trial judge, not the jury. Idaho Code, §18-108. The Court, in Gregg v. Georgia, at 49 L.Ed.2d 884-886, noted that there was a difference between sentencing by an experienced trial judge and sentencing by a jury. The Court did not rule on court sentencing in any of the relevant capital sentencing cases. The concerns which the Court expressed in Furman v. Georgia, and the 1976 cases were all directed toward unguided jury discretion.

. . . Since the members of the jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. . . To the extent that this problem is inherent in jury sentencing, it may not be totally correctible. It seems clear, however, that the problem will be alleviated if the jury is given guidance. . . . Gregg v. Georgia, 49 L.Ed.2d at 885.

Thus we begin with the premise that the Idaho sentencing procedure stands on a better footing than those which have been expressly disapproved.

STANDARDS FOR IMPOSITION OF THE DEATH PENALTY

Importantly, the United States Supreme Court did not find that the death penalty might never be imposed.

In sum, we cannot say that the judgment of the Georgia legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state the moral consensus concerning the death penalty and its social utility as a sanction require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it. Gregg v. Georgia, ___ U.S. ___, 49 L.Ed.2d at 882-883.

Nor did the Court hold that the penalty of death could not be imposed under any of the statutes found deficient. That question was not before the Court.

What the Court did say was that four major conditions must be satisfied before a state may inflict the death penalty. All four conditions relate to sentencing procedure.

1. A mandatory death penalty for first degree murder, applied without regard for the crime or the offender, does not satisfy the constitutional requirement that

. . . the state's power to punish "be exercised within the limits of civilized standards." Woodson v. North Carolina, 49 L.Ed.2d at 959.

It is clear, therefore, that sentencing in capital cases must involve some degree of discretion.

The history of mandatory death penalty statutes in the United States. . . reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and rigid. The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society--jury determinations and legislative enactments--both point conclusively to the repudiation of automatic death sentences. At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict. . . . Woodson v. North Carolina, 49 L.Ed.2d at 954.

2. Discretion to impose the death penalty must be narrowed and guided by the identification of significant aggravating factors, especially if sentencing is left to a jury. In reaching this conclusion, the Court was motivated by concern that the death penalty be imposed only where it was especially warranted and not in an arbitrary and capricious manner. Gregg v. Georgia, supra; Woodson v. North Carolina, supra.

3. Mitigating factors and the relevant facets of the character and record of the offender and the circumstances of the crime must be taken into consideration.

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of mankind. . . . Woodson v. North Carolina, 49 L.Ed.2d at 961.

4. Meaningful appellate review must be provided as a further safeguard against the imposition of sentences of death under the influence of passion, prejudice or any other arbitrary factor. Gregg v. Georgia, 49 L.Ed.2d at 808.

Inasmuch as the standards articulated by the Court in the 1976 cases are not specifically written into the Idaho statute, they must be found to exist elsewhere in the law if the present sentence is to be upheld. In fact, these standards are present in the corpus of the law of Idaho. Moreover, even if that were not the case, the Court could, by a limiting construction, restrict the application of the Idaho sentencing statute to those circumstances approved in the recent cases.

LEGISLATIVE INTENT

Several principles are generally applicable to the process of determining the validity of Idaho capital sentencing law and the manner of its application in this case.

It is, first of all, the duty of a reviewing court to affirmatively seek an interpretation of a legislative enactment which supports its constitutionality. Leonardson v. Moon, 92 Idaho 796, 451 P.2d 542 (1969); United States v. National Dairy Products Corp., et al., 372 U.S. 29, 9 L.Ed.2d 561, 565 (1963); Sully v. American Nat'l Bank, 178 U.S. 290, 44 L.Ed. 1072 (1900). Due respect for the principle of separation of powers requires that courts not intrude unnecessarily upon the legislative function.

Accordingly, although courts should not construe legislation according to judicial determinations of what is wise, they should go as far as is necessary to carry out the legislative purpose.

As Justice Harlan said

If an important congressional policy is to be perpetuated by recasting unconstitutional legislation, as the prevailing opinion has done here, the analytically sound approach is to accept responsibility for this decision. Its justification cannot be by resort to legislative intent, as that term is usually employed, but by a different kind of legislative intent, namely the presumed grant of power to the courts to decide whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional. Welsh v. United States, 398 U.S. 333, 355-356, 26 L.Ed.2d 308, 327-328 (1970) (concurring opinion)

The familiar rule that legislative intent is the lodestar of statutory construction, Willard v. First Security Bank of Idaho, 206 P.2d 770, 69 Idaho 265 (1949), is supportive of the duty to construe constitutionally. Legislative intent is crucial to the accurate resolution of the present controversy.

It has been recognized that the legislature, by enacting Idaho Code, §18-4004, "attempted to address the concerns expressed by the Court in Furman. . ." Gregg v. Georgia, supra, at 49 L.Ed.2d 819; fn 23, p.878. Idaho had no mandatory death penalty statute prior to the Furman decision in 1972. Moreover, mandatory death sentencing had previously been universally rejected in this country. Woodson v. North Carolina, supra; Williams v. New York, supra. The present statute was enacted in 1973, on the heels of

the Court's decision in Furman because it was thought that Furman required the elimination of discretion in capital sentencing.

In view of the persistent and unswerving legislative rejection of mandatory death penalty statutes beginning in 1838 and continuing for more than 130 years until Furman, it seems evident that the post-Furman enactments reflect attempts by the states to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing. . . . Woodson v. North Carolina, 49 L.Ed.2d at 957. (emphasis added)

The intent of the Idaho legislature in enacting Idaho Code, §18-4004, should be seen as an intent to retain the death penalty for first degree murder in a constitutional form. This Court should therefore construe Idaho sentencing law in a manner which incorporates federal constitutional standards. The power of the court to do this will be discussed at a later point in this writing.

The suggested reading of legislative intent is in accord with a rule many times stated by this and other courts, that is, that legislative intent is to be learned by considering the conditions which gave rise to the legislation and the purposes motivating its enactment. Noble v. Glenns Ferry Bank, Ltd., 91 Idaho 364, 367, 421 P.2d 444 (1966); Messenger v. Burns, 86 Idaho 26, 29-30, 382 P.2d 913 (1963); Perkins v. Lenora Rural High School, Etc., 237 P.2d 228 (Kan. 1951).

The courts which decided the foregoing cases recognized that the literal language of a statute is not the stopping point in construction when resort solely to the language of the statute would defeat the intent of the legislature.

CONSTRUCTION OF IDAHO LAW AUTHORIZING THE TRIAL
COURT'S JUDGMENT

Idaho Code, §18-4004, which provides that one convicted of murder in the first degree "shall suffer death," stands alongside Idaho Code, §18-108, which provides that the court shall determine the sentence and Idaho Code, §19-2515, which provides that where discretion as to the extent of punishment is conferred on the court, the court may hear evidence in mitigation and aggravation. These latter statutes afford a basis for construing the word "shall" in Idaho Code, §18-4004, to be directory, not mandatory. The predominating consideration of legislative intent here suggests that this Court construe the language of §18-4004, to allow for discretion in the imposition of the penalty of death. Discretion is constitutionally mandated and it is clear that the intent of the legislature was to make possible the imposition of the death penalty to the extent constitutionally permissible. The word "shall" may be so construed when to do so promotes the intent of the legislature.

In determining whether a statute mandatory in form should be construed as directory or permissive, the meaning and intention of the legislature must govern as the same may be ascertained not only from the phraseology of the statute but also by considering its nature, design and the consequences which would follow from construing it one way or the other. Hollingsworth v. Koelsch, 76 Idaho 203, 280 P.2d 415 (1955)

Accordingly, the word "shall" should be construed as non-mandatory when necessary to carry out legislative intent even

though the result may seem opposed to the letter of the statute. In re Mitchell's Estate, 123 P.2d 503 (Cal. 1942). See also: Escoe v. Zerbst, 295 U.S. 490, 79 L.Ed. 1566 (1935); Pulcifer v. Alameda County et al., 175 P.2d 1 (Cal. 1946).

To go further, the case law of Idaho establishes that there exists an inherent power in the judiciary to exercise discretion in sentencing. State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971). While this discretion must be exercised subject to the constitutional requirements of Gregg v. Georgia, supra, Idaho Code, §18-4004, must be read in light of State v. McCoy, supra. Thus considered, the law of Idaho cannot be said to contain an irrevocably mandatory death sentencing provision.

But what of the other constitutional requisites for imposition of the death penalty--guided discretion, the opportunity to present evidence mitigating the offense, and meaningful appellate review of the sentence? These too can be found in existing Idaho law.

The requirement for guided discretion was satisfied in Gregg v. Georgia, supra, Proffitt v. Florida, supra, and Jurek v. Texas, supra, by statutory specification of aggravating factors upon which a death sentence could be based. The same rule--that the death penalty may not be imposed except in aggravated circumstances--is already a part of Idaho law,² even to the extent that some specific aggravating factors have been identified. This Court

has said that

To choose between the punishments of life imprisonment and death there must be some distinction between one homicide and another. This case exemplifies an abandoned and malignant heart and sadistic mind, bent upon taking human life. It is our considered conclusion, from all the facts and circumstances, the imposition of the death sentence was not an abuse of discretion by the trial court. State v. Snowden, 79 Idaho 266, 275, 313 P.2d 706 (1957). (emphasis added)

The aggravating factors specified by this Court in Snowden, coincide with an aggravating factor in the Georgia statute³ approved in Gregg v. Georgia, supra.

Mitigating evidence may also be presented under Idaho law, Idaho Code, §19-2515, and there seems to be no question that a defendant has an unqualified right to be heard in mitigation. Certainly, the Court must reach that conclusion in light of the

² That the law includes the decisions of courts as well as statutes was recognized in Jurek v. Texas. The Court noted that the Texas statute did not include any provision for receiving evidence in mitigation but that the Texas Court of Criminal Appeals had read such a requirement into the statute, a result which was approved. Jurek v. Texas, slip, pp.8-9.

³ ***

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Ga. Code Ann., §27-2534.1 (Supp. 1975) Gregg v. Georgia, supra

constitutional mandate. See State v. Owen, 73 Idaho 394 (1953).

The final item in the list of constitutional prerequisites to be considered is the requirement of meaningful appellate review of death sentences. The review process was characterized by the Court in Gregg as "a check against the random or arbitrary imposition of the death penalty." Gregg v. Georgia, 49 L.Ed.2d at 888. The Idaho review procedure serves the same function. In Idaho, review on appeal by the defendant is not discretionary. Idaho Code, §19-2803. Thus, any defendant desiring to appeal has the right to have his case considered by this Court. The sentencing cases decided by this Court indicate that the Court has paid careful attention to the fairness and uniformity of sentences imposed in Idaho. See: State v. French, 95 Idaho 853, 522 P.2d 61 (1977); State v. Cornwall, 95 Idaho 680, 518 P.2d 863 (1974). The very fact that the Appellant is before this Court belies his claim that the Idaho sentencing procedures do not provide for meaningful appellate review of death sentences. As far as the issue of arbitrariness and capriciousness in the imposition of sentence is concerned, there is no reason--and none has been suggested--why this Court cannot follow the same steps provided by the Georgia statutes for testing a death sentence.

In reaching the conclusion that the district court may, on resentencing, impose a constitutionally valid sentence of death, the State relies on existing law as gleaned from the statutes of the State, the applicable case law and construction of the statutory

language. This view of the law alone is sufficient to sustain the Appellant's sentence.

However, considerations of equal importance lie within the Court's power to construe §18-4004 by generally limiting its application.

LIMITING CONSTRUCTION

It goes almost without saying that appellate courts regularly limit the applicability of statutes to insure that they are applied in a constitutional manner. In this case, the court may fully effectuate the intent of the legislature by affirming the validity of the primary legislative judgment that the death penalty may be imposed for first degree murder, but imposing the constitutional limitations upon the effectuation of that policy.

In this connection, it is to be emphasized that the court is not asked to rewrite the statute but only to limit its application by a process of construction to which courts have traditionally resorted in order to insure that both the intent of the legislature and the legal protections due the accused are served.

The present Appellant, were he correctly resentenced to death, would have no basis for complaint in the United States Supreme Court that he had been denied federal constitutional rights inasmuch as the result would have accomplished in substance what would have been accomplished had the correct procedure been set out in a statute. Mortenson v. United States, 322 U.S. 369, 88 L.Ed. 1331 (1944); New York ex rel Hatch v. Reardon, 204 U.S. 152, 160-161,

51 L.Ed. 415, 422 (1907); Barrows v. Jackson, 346 U.S. 249, 97 L.Ed. 1586 (1953).

In New York ex rel Hatch v. Reardon, supra, the defendant had contended that a tax act he was convicted of violating constituted, inter alia, an unconstitutional interference with interstate commerce. Mr. Justice Holmes, noting that the defendant had not acted in an interstate transaction and was not one of those in the class to whom the act might be unconstitutionally applied, stated that the United States Supreme Court would not speculate on imaginary applications of a statute. This statement was made, Mr. Justice Holmes explained, because a state court might appropriately limit the scope of such a statute in order to apply it in a constitutional manner.

Hatch v. Reardon illustrates the rule that one who has not been harmed by a statute which could be unconstitutionally applied, but was not, has no standing to complain. The present Appellant, were he resentenced to death according to proper procedures, would stand in the same position.

The lack of standing rule is related to the concept of limiting construction to the extent that a limiting construction adopted by a state court to cause a statute to be constitutionally applied prevents the accused from sustaining constitutional injury and removes cause for reversal of the judgment against him.

There are still other cases in which the Court has held that even though a party will suffer a direct substantial injury from application of a

statute, he cannot challenge its constitutionality unless he can show he is within the class whose constitutional rights are allegedly infringed. . . . [citations omitted] One reason for this ruling is that the state court, when actually faced with the question might narrowly construe the statute to obliterate the objectionable feature, or it might declare the unconstitutional provision severable. Barrows v. Jackson, supra, 97 L.Ed. at 1595. (emphasis added)

The authority of a state appellate court to impose upon a state statute a limiting construction actuated by federal constitutional requirements has its roots in the relationship between state and federal courts. The highest court of a state is empowered to construe the state's statutes and that construction is binding upon the United States Supreme Court. If the construction adopted by the state court infringes upon some constitutional right, the Supreme Court may reverse and remand, in which case the state court is at liberty to reconstrue the offending statute in a constitutional manner. The litigatory history of the case of Georgia R. & Electric Co. v. Decatur, 176 SE 494, rev'd 295 U.S. 165, 79 L.Ed. 1365, reconstructed 182 SE 32, aff'd 297 U.S. 620, 80 L.Ed. 925 is illustrative. There, a street railway company sued to challenge an assessment against railway property for street paving. The railway company contended on appeal to the Georgia Supreme Court that it had been denied due process by the trial court's action in excluding evidence that it had not benefited from the paving. The Georgia Court held that "benefit," or lack of it, was relevant but that the trial court properly excluded the

evidence because the ordinance authorizing the paving, enacted pursuant to statute, created a presumption of benefit to the railway company into which the court would not inquire in the absence of arbitrary abuse of authority.

The United States Supreme Court reversed the Georgia judgment, holding that it was bound by the Georgia court's construction of its statute, which construction created an unconstitutional taking of property without due process of law. The case was remanded for further proceedings "not inconsistent with this opinion," (as was the case in Woodson v. North Carolina, supra, and Roberts v. Louisiana, supra).

On remand the Georgia Court reconstrued its statute by holding that the statute did not require a showing of benefit as a prerequisite to imposing an assessment, again affirming the trial court.

The railway company took a second appeal to the Supreme Court, which this time upheld the Georgia court.

After the first decree was reversed and set aside, the cause went back for disposition by the Supreme Court [of Georgia]. Our mandate restricted its powers in that regard so far as necessary to prevent conflict with rulings here, but not otherwise. Only federal questions were open for our determination. We accepted the construction placed upon the statutes by the Supreme Court [of Georgia] and held that to so apply them would deprive appellants of a federal right. We suggested no interpretation of our own, and did not affirmatively indicate the further action to be taken. . . . Without exceeding the imitations prescribed, the Supreme Court reconsidered the cause, put its own construction upon

the statutes and adjudged accordingly. Georgia R. & Electric Co. v. Decatur, 80 L.Ed. at 927.

The effect of reconstruction following remand "is not to reverse the Supreme Court's decision but to make it retroactively moot by changing its premise." Note, 49 Harv. L.Rev. 838, 839.

See also: Kinzell v. Chicago Etc. Ry. Co., 33 Idaho 1, 190 Pac. 255 (1920).

In United States v. Raines, 362 U.S. 17, 4 L.Ed.2d 524 (1960), the Court held that it was bound never to formulate a rule of constitutional law broader than that required by the precise facts to which it is to be applied. The court did not wish to venture into hypothetical statutory applications, as would be the case if the court were to find a statute unconstitutional in circumstances where the litigating party was not adversely affected by the assertedly unconstitutional feature. One hazard of hypothetical applications the Court noted, was that actual unconstitutional applications of a statute would not arise if the court responsible for the construction of a statute gave it a limiting construction in cases where applications of doubtful constitutionality were in fact presented. See also: United States v. National Dairy Products Corp., et al., 372 U.S. 29 9 L.Ed.2d 561 (1963).

In the aftermath of Gregg v. Georgia, supra, at least one state Supreme Court has already relied on its power to apply a limiting construction to a death penalty statute which would be otherwise deficient in providing the constitutionally required sentencing procedures.

The Mississippi Supreme Court, in Jackson v. State, 337 So.2d 1242 (1976), held that the state's mandatory death penalty statute would be authoritatively construed to incorporate the guidelines of Gregg v. Georgia and the related 1976 decisions.

The holdings in these cases require us to take a second look at our death penalty statutes to determine the dominant intent of the legislature in enacting them; to determine whether the statutes are constitutional if implemented by procedural guidelines and safeguards approved in Gregg and its companion cases; and to determine whether this court should exercise its inherent power to formulate guidelines which the Supreme Court of the United States has clearly held are required in death penalty cases. Jackson v. State, 337 So.2d at 1250. (emphasis added)

The Court was greatly concerned with legislative intent, which it interpreted as follows:

A reading of sections 97-3-21 and 97-17-20 in the light of the history of death penalty statutes in Mississippi reveals beyond any question that the dominant intent of the legislature in 1974 was to enact a death penalty statute that would meet what were then considered to be constitutional requirements, and we so find. Id., at p.1251. (emphasis added)

It can be seen that the Mississippi court found that the legislature intended its death penalty enactment to be valid to whatever extent it could be sustained, consistently with the suggestion of Mr. Justice Holmes in New York ex rel Hatch v. Reardon,

⁴ This Court also has statutory power to formulate procedural rules. I.C., §1-212

supra, 51 L.Ed. at 422. The court ruled that the mandatory language of the Mississippi statute would be read as permissive and the constitutional procedural requirements incorporated by construction.⁵ Jackson was remanded for a new trial in which the new guidelines would be incorporated. However, the remand was based on Mississippi jury sentencing procedure. A new trial is unnecessary here where the Appellant would be resentenced by the trial judge. A new trial would not be necessary to insure that Appellant has the benefit of the constitutional guidelines.

It should also be remembered that the Texas capital sentencing procedure was upheld in part in Jurek v. Texas, supra, as the result of a limiting construction adopted by the Texas appellate court:

. . . The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.

The second Texas statutory question asks the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" if he were not sentenced to death. The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as "criminal acts of violence" or "continuing

⁵ Another example of restrictive factors read into the law occurs in Miranda v. Arizona, where the court fashioned an exclusionary rule to remedy deprivations of the right against self-incrimination. No statute was required to restrict police action or the rules of evidence.

threat to society." In the present case, however, it indicated that it will interpret this second question as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show. . . . Jurek v. Texas, 49 L.Ed.2d at 938-939.

Note State v. Snowden, supra, which by implication conditions imposition of the death penalty on the presence of sufficient aggravation to overcome any mitigating factors.

SENTENCE CONNECTION

There is ample authority for the proposition that a defective sentence can be corrected by the simple process of removing the defects.

The United States Supreme Court held in In re Bonner, 151 U.S. 242, 38 L.Ed. 149 (1894), that a sentence which exceeded the jurisdiction of the court could be corrected. The defendant was convicted of larceny and sentenced to serve a maximum term of one year in a state penitentiary, there being no suitable jail available. The Supreme Court held that it was beyond the power of the trial court to order a one year sentence to be served in a penitentiary, but the error could be corrected in a resentencing proceeding.

Much complaint is made that persons are often discharged from arrest and imprisonment when their conviction, upon which such imprisonment was ordered, is perfectly correct, the excess of jurisdiction on the part of the court being in enlarging the punishment or in enforcing it in a different mode or place than that provided by law. But in such cases there need not be any failure of justice, for where the conviction is

correct and the error or excess of jurisdiction has been as stated, there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be corrected. The judges of all courts of record are magistrates, and their object should be not to turn loose upon society persons who have been justly convicted of criminal offenses, but, where the punishment imposed, in the mode, extent, or place of its execution, has exceeded the law, to have it corrected by calling the attention of the court to such excess. We do not perceive any departure from principal or any denial of the prisoner's right in adopting such a course. He complains of the unlawfulness of his place of imprisonment. He is only entitled to relief from that unlawful feature, and that he would obtain if opportunity be given to that court for correction in that particular. . . . in a vast majority of cases the extent and mode and place of punishment may be corrected by the original court without a new trial, and the party punished as he should be whilst relieved from any excess committed by the court of which he complains. In such case the original court would only set aside what it had no authority to do and substitute directions required by the law to be done upon the conviction of the offender. 38 L.Ed. 152-153. (emphasis added)

Thus, the death penalty could still be imposed if the correct procedures are followed on resentencing, as illustrated by Jackson v. State, supra.

See also: Pollard v. United States, 352 U.S. 354, 1 L.Ed.2d 393 (1957); Bozza v. United States, 330 U.S. 160, 91 L.Ed. 818 (1947); Ellerbrake v. United States, 134 F.2d 683 (CA7 1943), cert. den. 87 L.Ed. 1565 (1943); McDonald v. Moinet, 139 F.2d 939 (CA6 1944), cert. den. 88 L.Ed. 1565; Fleisher v. United States, 302 U.S. 218, 82 L.Ed. 208 (1937).

VALIDITY OF APPELLANT'S CONVICTION

The foregoing cases, as well as lending support to the authority of the court to correct defective sentencing procedures by authoritative construction, also dispose of Appellant's second major contention that he must be released entirely on the theory that an invalid sentence invalidates his conviction.

[The Supreme] Court has rejected the "doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing sentence. *Re Bonner, supra*, (151 U.S. at 260, 38 L.Ed. 153, 14 S.Ct. 323). The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner. [citation omitted]. In this case the court "only set aside what it had no authority to do and substitute[d] directions required by law to be done upon the conviction of the offender." *Re Bonner, supra*, at 260. It did not twice put petitioner in jeopardy for the same offense. The sentence, as corrected, imposes a valid punishment for an offense instead of an invalid punishment for that offense. *Bozza v. United States, supra*, 91 L.Ed. at 822.

The Appellant also seems to contend that the statute under which he was convicted is invalid. The definition of murder in the first degree is part of a different statute than that which fixes the penalty. No court has declared the Idaho definition of murder unconstitutional.

JUDICIAL POWER OVER SENTENCE CORRECTION

With general reference to the power of this court to limit the application of the Idaho statute by authoritative construction, it should be noted that we do not suggest that the Court should

usurp the prerogatives of the legislature. In its simplest form, the issue here is whether the Defendant's sentence should be reduced. There is no prospect of imposing a higher sentence--the Defendant was sentenced to suffer the ultimate penalty pursuant to a legislative judgment that such penalty is permissible. Thus, all of the issues of this case fall within the ambit of sentence reduction, an area of judicial and not legislative authority. United States v. Benz, 282 U.S. 304, 311; State v. McCoy, supra.

JURY WAIVER

Appellant contends that denial of his motion to waive jury trial was reversible error.

It is argued that the right to jury trial is a constitutional privilege which may be waived. Assuming that were so, Appellant cites no authority for the proposition that there is a right to waive a jury trial.

In Idaho, the court is not empowered to dispense with a jury in a felony case. Idaho Constitution, Art. I, §7; State v. Scheminisky, 31 Idaho 504, 174 Pac 611.

Appellant states that "the conditions of the prejudicial pretrial publicity" made it necessary that he be tried without a jury. He does not specify in what manner he was prejudiced and a review of the entirety of the voir dire examination demonstrates that very few problems with pretrial publicity were encountered in selecting the jury. (Tr., pp.864-1576).

CHALLENGES FOR CAUSE

Appellant states, by way of his third assignment of error, that

Allowing the jurors to be challenged and dismissed by the prosecution for cause, based solely on their non-belief in capital punishment, was improper, and, therefore, error. (App. Br., p.4)

Appellant's assignment of error is a correct statement of the law but a manifestly incorrect statement of the facts of this case.

In Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968), the Supreme Court held that it was constitutionally impermissible to exclude jurors from service in a capital case for cause because of conscientious scruples against the death penalty. But the court expressly stated that this rule is not applicable to the exclusion of persons who cannot vote to convict in a capital case, no matter what the evidence shows.

If the state had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply "neutral" with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the state crossed the line of neutrality. . .

Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious scruples against such infliction. . . Witherspoon v. Illinois, 20 L.Ed.2d at 784-785.

See also: Boulden v. Holman, 394 U.S. 478, 22 L.Ed.2d 433 (1969); In re Anderson, 447 P.2d 117 (1968).

Witherspoon and its progeny apply only to challenges for cause. Moreover, those decisions were aimed at preventing death-oriented juries. They have little applicability in cases such as this one where the jury does not impose sentence but decides only the question of guilt or innocence.

Nonetheless, the Court and the State were well aware of the law and no juror whatever was excluded for cause because that juror had conscientious reservation about the death penalty. (Tr. pp.864-1576).

In at least one instance, the defendant challenged for cause a juror who expressed reservations about the death penalty and the State resisted the challenge. (Tr. pp.948-970).

The members of the jury panel were questioned individually out of the presence of the others. The challenges for cause, in addition to the one mentioned above, were as follows.⁶

1. Barbara Crinkovitch, (Tr. p.923), challenged for cause by defendant because she had formed an opinion of guilt. Not resisted.
2. Jack Etherton, (Tr. p.938, ls.5-7), challenged for cause by the State because he stated that he could not vote for a first degree murder conviction under any circumstances. (Tr. p.937, ls. 20-25). The defendant did not resist the challenge.

⁶ Does not include persons excused for good reason by the court, usually upon the agreement of counsel.

3. Arlene Sorenson, (Tr., p.1085, 1.22), challenged for cause by the State because reservations about the death penalty would have prevented her from voting for a first degree murder conviction under any state of the evidence. (Tr., 1s.16-20). The challenge was not resisted by Defendant.
4. Marijean Lemieux, (Tr. p.1095), excused for cause at the apparent suggestion of the court, (Tr. p.1094, 1.25), because of bias. Counsel agreed.
5. Roland Sisk, challenged for cause, by implication, for bias. Not resisted by counsel. (Tr. p.1134).
6. Ruth E. Daiker, initially challenged for cause by Defendant, (Tr., p.1151), resisted by State. No grounds were stated; the challenge was denied and later withdrawn. (Tr. pp.1153, 1154).
7. William Cecil, challenged for cause by the State on the basis of his statement that he could not vote to convict for first degree murder, no matter what the evidence showed. (Tr. pp.1235-1236). The challenge was resisted by counsel but granted by the court. (Tr., p.1237)
8. Robert Williamson, challenged for cause by the State because he stated that he could not return a verdict of guilty of first degree murder under any circumstance. (Tr., p.1258, 1s.11-18) The challenge was not resisted.
9. Ida Johnson, challenged by State on the basis of her statement that she could not vote to convict for first degree murder under any circumstances. (Tr., p.1265) The challenge was resisted by the defense, but granted.
10. Penny Benson, challenged by Defendant for existing bias. (Tr., p.1310) The challenge was not resisted by the State.
11. Robert Yost, challenged by Defendant for bias. (Tr., p.1316) The State did not resist the challenge.
12. Betty Barr, initially challenged by Defendant on account of a prejudice against drug use. Following argument, Defendant passed the juror for cause. (Tr., pp.1329-1337)

13. Bill James, challenged for cause by Defendant for bias. (Tr., p.1389) The challenge was not resisted. (Tr., p.1391)
14. S. Hill, challenged by Defendant for bias. (Tr., p.1487) The challenge was not resisted by the State. (Tr., p.1487)

A thorough review of the voir dire proceedings demonstrates that most jurors who were eventually selected were neutral about the death penalty. Every potential juror who expressed general or specific reservations about the death penalty or opposition to it but who said he or she could fairly decide the case was passed for cause by the State. See: Claypool, Tr. p.899; Jaeger, pp. 1036, 1041; Bennett, pp.1072, 1078; Stinson, pp.1100, 1103; Horine, pp. 1193, 1202; Coulter, pp.1272, 1279; Everett, pp.1296, 1301; Adams, pp.1373, 1378; Jordan, pp.1465, 1466, 1476; Honeycutt, p.1569.

Wanda Bennett, Ester J. Everett and Lillian Honeycutt, all of whom had reservations about the death penalty, were eventually seated as jurors, Mrs. Honeycutt as an alternate.

CROSS-APPEAL

The State had intended to urge several issues relating to voir dire questions and the rejection of evidence at trial and therefore filed a notice of cross-appeal. However, inasmuch as none of the issues raised by Appellant's brief are related to the conduct of the trial, except the issue of challenges for cause, the State will not now press its own appellate points. The State reserves its right to do so in the event that, for some reason, the validity of

Appellant's conviction is drawn into question in any manner other than by what has already been presented.

CONCLUSION

The judgment of conviction should be affirmed in all respects. This case should be remanded for resentencing with instructions to apply the governing constitutional guidelines and to resentence Appellant to death, should the proper findings be made.

DATED This 22nd day of February, 1977.

Respectfully submitted,

WAYNE L. KIDWELL
ATTORNEY GENERAL



LYNN E. THOMAS
Deputy Attorney General
State of Idaho

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT I have this 22nd day of February, 1977, served a true and correct copy of the above BRIEF OF RESPONDENT, by placing a copy in the United States mail, postage prepaid, and addressed to Mr. Bruce O. Robinson, Attorney at Law, 1320 12th Ave. So., Nampa, Idaho 83651, counsel for Appellant.



LYNN E. THOMAS
Deputy Attorney General
State of Idaho

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO,

Plaintiff-Respondent,

vs.

THOMAS EUGENE CREECH,

Defendant-Appellant.

No. 12224

APPELLANT'S BRIEF

Appeal from the District Court of the First Judicial
District of the State of Idaho, in and for the
County of Shoshone

HONORABLE J. RAY DURTSCHI, District Judge

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FILED

DEC 27. 1976

SUPREME COURT OF IDAHO
R. H. YOUNG, CLERK

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IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	
)	
vs.)	No. 12224
)	
THOMAS EUGENE CREECH,)	
)	
Defendant-Appellant.)	
)	
)	

BRIEF OF APPELLANT

STATEMENT OF FACTS

Defendant-appellant, THOMAS EUGENE CREECH, was charged with two counts of Murder in the First Degree, by a criminal complaint dated the 8th day of November, 1974.

The plaintiff-respondent, THE STATE OF IDAHO, filed an Information dated December 4, 1974, charging the said defendant with two counts of Murder in the First Degree. (Crt. Tr. 4-5) A partial arraignment was held in Valley County, Idaho, on the 4th day of December, 1974, and the matter was continued until the 8th day of January, 1975, for the purpose of psychiatric examination prior to entering of plea. (Crt. Tr. 6-10)

On the 8th day of January, 1975, in Ada County, Idaho, the defendant-appellant entered a plea of not guilty to both counts of Murder in the First Degree. (Crt. Tr. 15) Trial was

set to commence, and did commence, on the 20th day of May, 1975.
(Crt. Tr. 29)

On the 22nd day of May, 1975, the Court entered an Order granting defendant-appellant's Motion for Change of Venue, the jury was discharged, and the case was continued for further proceedings. (Crt. Tr. 530)

On the 18th day of June, 1975, pursuant to hearing on the 9th day of June, 1975, an Order was entered granting defendant-appellant's Motion for Change of Attorneys, whereby BRUCE O. ROBINSON, Attorney at Law, Nampa, Idaho, was entered as retained counsel for the defendant-appellant, and WARD HOWER, Attorney at Law, Cascade, Idaho, was withdrawn as court-appointed counsel for said defendant-appellant. (Crt. Tr. 551)

On the 14th day of July, 1975, pursuant to hearing on July 15, 1975, the Court entered its Order Changing the Venue for the trial of said action to Wallace, Shoshone County, Idaho. (Crt. Tr. 582) On the 14th day of August, 1975, pursuant to Stipulation of counsel, trial was set to commence, and did commence, on the 6th day of October, 1975. (Crt. Tr. 862)

The jury found defendant-appellant, THOMAS EUGENE CREECH, guilty on both counts of Murder in the First Degree on the 22nd day of October, 1975; and sentencing was set for the 3rd day of November, 1975.

On the 4th day of November, 1975, the Court entered its Order Denying defendant-appellant's Motion for a New Trial. (Crt. Tr. 3067) On the 13th day of January, 1976, the Court entered

its Order Denying defendant-appellant's Motion to Set Aside Verdict. (Crt. Tr. 3092)

On the 25th day of March, 1976, an Order was entered by the Court denying defendant-appellant's Motion pro se for a new trial; (Crt. Tr. 3138) and a Judgment of Conviction was entered by the Court wherein THOMAS EUGENE CREECH was sentenced to suffer death on the 21st day of May, 1976. (Crt. Tr. 3140)

On the 5th day of April, 1976, an Order Staying Execution was entered by the Court.

ASSIGNMENT OF ERROR

I.

The mandatory death penalty for conviction of Murder in the First Degree, as provided in Idaho Code Section 18-4004, and defined in Idaho Code Section 18-4003, is unconstitutional under the provisions of the Eighth and Fourteenth Amendments of the U. S. Constitution; and sentencing the defendant to death thereunder was error.

II.

The denial of the defendant's right to dispense with a jury trial and to try the matter to the Court was improper under the conditions of the prejudicial pre-trial publicity, and was, therefore, error.

III.

Allowing the jurors to be challenged and dismissed by the prosecution for cause, based solely on their non-belief in capital punishment, was improper, and, therefore, error.

IV.

The District Court was in error in entering judgment against defendant under the void provisions of Idaho Code Section 18-4003 and Idaho Code Section 18-4004.

POINTS AND AUTHORITIES

I.

A STATE STATUTE INFLICTING THE PUNISHMENT OF DEATH CANNOT WITHSTAND A CONSTITUTIONAL CHALLENGE FROM THE EIGHTH AMENDMENT, AS APPLIED TO THE STATES UNDER THE FOURTEENTH AMENDMENT, WITHOUT MEETING THESE BASIC REQUIREMENTS:

FIRST, A MANDATORY DEATH STATUTE MUST PROVIDE A STANDARD TO GUIDE A JURY,

SECONDLY, THERE MUST BE SOME MEANINGFUL APPELLATE REVIEW OF THE JURY'S DECISION,

THIRDLY, THERE MUST BE A SEPARATE SENTENCING PROCEEDING IN WHICH THE SENTENCING AUTHORITY MAY FOCUS ON THE SENTENCE AND CONSIDER SOME OR ALL OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

Jurek v. Texas, 96 S.Ct. 2950 (1976).

Gregg v. Georgia, 96 S.Ct. 2909 (1976).

Proffitt v. Florida, 96 S.Ct. 2960 (1976).

Roberts v. Louisiana, 96 S.Ct. 3001 (1976).

Woodson v. North Carolina, 96 S.Ct. 2978 (1976).

II.

A DEFENDANT WHO IS ACCUSED OF A FELONY MAY WAIVE HIS RIGHT TO A JURY TRIAL AND HAVE THE COURT SIT IN ITS CAPACITY AND AS THE TRIER OF FACT.

State v. Irving, 533 P.2d 1255 (Kansas, 1975)

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444,
20 L.Ed.2d 491

Patton v. United States, 281 U.S. 276, 50 S.Ct. 53,
74 L.Ed. 854.

U.S. v. Taylor, 498 F.2d 390 (6th Cir., 1974)

State v. Christensen, 199 P.2d 475 (Kansas, 1948)

State v. Kelsey, 532 P.2d 1001 (Utah, 1975)

State v. Maguire, 539 P.2d 421 (Utah, 1974)

Hoffman v. State, 98 Ohio St. 137, 120 N.E. 234 (1918)

III.

ALLOWING THE JURORS TO BE CHALLENGED AND DISMISSED BY
THE PROSECUTION FOR CAUSE, BASED SOLELY ON THEIR NON-BELIEF IN
CAPITAL PUNISHMENT WAS IMPROPER.

Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776,
88 S.Ct. 170 (1968)

Boulden v. Holman, 394 U.S. 478, 22 L.Ed.2d 433,
89 S.Ct. 1138 (1969).

Georgia v. _____, _____ U.S. _____, decision
rendered December 6, 1976.

IV.

AN UNCONSTITUTIONAL ACT IS NOT A LAW AND CONFERS NO
RIGHTS AND AFFORDS NO PROTECTION. ONE CANNOT BE CONVICTED OF A
CRIME WHEN THE STATUTE CREATING THE CRIME IS DECLARED UNCONSTITUTIONAL.

State v. Costello, 77 Idaho 205 (1956)

State v. Village of Garden City, 74 Idaho 513 (1953)

State v. Sulman, 165 Conn. 556; 339 A2d 62 (1973)

Application of Boyd, 187 F.Supp. 113 (1959)
Affirmed 281 F2d 195 (1959)

Engle v. Caudill, 288 SW2d 480 (1956)

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Byrd v. State, 110 So.2d 52 (Fla. 1959)

ARGUMENT

I.

The United States Supreme Court has set out the guidelines which will allow a state to inflict the sentence of death on any human being for the violation of that state's statutes. These guidelines are specifically set out in five opinions handed down in July of 1976. The statute which is most like that in question here is that of Louisiana as described in Roberts v. Louisiana, 96 S.Ct. 3001 (1976).

The Louisiana statute in question there was La. Rev. Stat. Ann. Section 14:30 (1974): "First degree murder. First degree murder is the killing of a human being:

- (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
- (2) When the offender has a specific intent to kill, or inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
- (3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
- (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
- (5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder. * * * Whoever commits the crime of first degree murder shall be punished by death."

A charge of murder in the first degree in the State of Idaho is set out in the following statutes:

I.C. Section 18-4001: "Murder defined. Murder is the unlawful killing of a human being with malice aforethought."

I.C. Section 18-4003: "Degrees of murder. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing is murder in the first degree. Any murder of any peace officer of this state or of any municipal corporation or political subdivision thereof, when the officer is acting in line of duty, and is known or should be known by the perpetrator of the murder to be an officer so acting, shall be murder in the first degree. Any murder committed by a person under a sentence for murder of the first or second degree shall be murder in the first degree. All other kinds of murder are of the second degree."

I.C. Section 18-4004: "Punishment for murder. Every person guilty of murder in the first degree shall suffer death."

The Idaho statute lists two of the five offenses which allow for first degree murder under the Louisiana statute. The first general clause is almost identical with that found in North Carolina and cited in Woodson v. North Carolina, 96 S.Ct. 2978 (1976):

"Murder in the first and second degree defined: punishment. --A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, . . . shall be deemed to be murder in the first degree and shall be punished with death."

The North Carolina statute also allowed the jury to recommend life imprisonment if it wished to avoid the rendition of capital punishment on the defendant:

N.C. Gen. Stat. Section 14-17: "Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

The Louisiana statute did not allow for such provisions, (See Roberts, Supra., at 3005). In that instance, it was much like the Idaho system as required by I.C. Section 19-2601, Section 18-106 and Section 19-2708.

I.C. Section 19-2601: "Commutation, suspension, withholding of sentence. Whenever any person shall have been convicted, or enter a plea of guilty, in any district court of the state of Idaho, of or to any crime against the laws of the state, except those of treason or murder. . . ." (emphasis added).

I.C. Section 18-106: "Court to impose punishment. The several sections of this code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed."

I.C. Section 19-2708: "Suspension of judgment of death. No judge, court, or officer, other than the governor, can suspend the execution of a judgment of death, . . ."

One difference to be noted is that in Louisiana there was a unique system of responsive verdicts under which the jury in every first degree murder case had to be instructed on the crimes of first degree murder, second degree murder, and manslaughter, and had to be provided with verdicts of guilty, guilty of second degree murder, guilty of manslaughter and not guilty. (La. Code Crim. Proc. Ann., Arts. 809, 814) No such instructions nor verdicts are so required under the Idaho law, although they were given by the Court. The jury was given no guidelines

in determining the sentencing of the defendant.

The conclusion of a study of these statutes shows that the legislature of Idaho has mandated a death sentence for all persons found guilty of first degree murder, without discretion either by the jury or by the judge. The system is similar to that of Louisiana as explained in Roberts v. Louisiana, supra., and that of North Carolina as explained in Woodson v. North Carolina, supra.

The United States Supreme Court determined that a state statute inflicting the punishment of death could not withstand the constitutional challenge from the eighth amendment, as applied to the states under the fourteenth amendment, without meeting these basic requirements:

First, as pointed out in Woodson, supra., at 2991, a mandatory death statute must provide standards to guide a jury:

"North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first degree murderers shall live and which shall die."

Second, there must be some meaningful appellate review of the jury's decision:

". . . there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences."
Id. at 2991.

Thirdly, there must be a separate sentencing proceeding in which the sentencing authority may focus on the sentence and consider some or all of the aggravating and mitigating circum-

stances:

"A third constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Id. at 2991

The same three infirmities were also found in the Louisiana mandatory death statute:

"The constitutional vice of mandatory death sentence statutes--lack of focus on the circumstances of the particular offense and the character and propensities of the offender--is not resolved by Louisiana's limitation of first degree murder to various categories of killings. * * * Even the other more narrowly drawn categories of first degree murder in the Louisiana law afford no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender.

Louisiana's mandatory death sentence statute also fails to comply with Furman's requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences. * * * The Louisiana procedure neither provides standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's de facto sentencing discretion." Roberts v. Louisiana, supra., at 3-06.

"As in North Carolina, there are no standards provided to guide the jury in the exercise of its power to select those first degree murderers who will receive death sentences and there is no meaningful appellate review of the jury's decision." Id. at 3007.

The Court explained that it is imperative that the sentencing be individualized in death penalty cases, as death is irreversible. Hence, the necessity of requiring particularized con-

sideration of relevant aspects of the character and record of each convicted defendant before the imposition of a sentence of death, and that such requirement be part of the statute imposing the death penalty.

In summary, this Court must find the Idaho statute, Idaho Code Section 18-4004, unconstitutional as it does not meet any of the three requirements imposed by the United States Constitution in the eighth and fourteenth amendments as interpreted by the United States Supreme Court in the five decisions made reference to hereinabove. Idaho Code Section 18-4004 does not: (1) provide standards to guide the jury in the exercise of its power to select those first degree murderers who will receive the death sentence and those who will not; (2) ensure a meaningful appellate review of the jury's decision; and (3) require separate sentencing proceedings in which the sentencing authority may focus on the sentence and consider the aggravating and mitigating circumstances.

II.

A DEFENDANT WHO IS ACCUSED OF A FELONY MAY WAIVE HIS RIGHT TO A JURY TRIAL AND HAVE THE COURT SIT IN ITS CAPACITY AND AS THE TRIER OF FACT.

The right of a criminal defendant to be tried by a jury of its peers, rather than by the court alone, is fundamental to the American scheme of justice. (State v. Irving, 533 P.2d 1255 (Kansas, 1975)); Duncan v. Louisiana, 391 U.S. 145,

88 S. Ct. 1444, 20 L.Ed.2d 491).

Despite the fundamental nature of the right to a jury trial, it is agreed these constitutional and statutory provisions extend a privilege to the accused which may be waived. (State v. Irving, Supra.; Patton v. United States, 281 U.S. 276, 50 S.Ct. 53, 74 L.Ed. 854; U.S. v. Taylor, 498 F.2d 390 (6th Cir. 1974); State v. Christensen, 199 P.2d 475 (Kansas, 1948)). The trial by jury is a right to be claimed, and not a burden to be born. A right is something which is to one's benefit or advantage. It may be that for a variety of reasons, or combination of them, a man would rather be tried by a jury. If so, there is no reason why a jury should be forced upon him. (State v. Kelsey, 532 P.2d 1001 (Utah, 1975)).

In State v. Maguire, 539 P.2d 421 (Utah, 1974), the defendant was charged with first degree murder, and had waived a jury on his own motion. The action was heard by the court and a second degree murder conviction was rendered. Article I, Section 10 of the Constitution of the State of Utah states:

"In capital cases the right of trial by jury shall remain inviolate. * * *"

The Supreme Court of Utah said:

"We think that because the Constitution gives him an 'inviolable' right, necessarily does not mean that he has to accept it. In that sense, which is the only reasonable and fair sense we know attributable to the constitutional sanction is to say it is a 'privilege' and not a 'mandate'--elsewise a constitutional interdiction ordinarily designed for the preservation of one's sacred rights might be a vehicle carrying him to rights following his own

destruction by sweet forced charity which forthrightly he has attempted to shun. Such conclusion amply is echoed in Hoffman v. State, (98 Ohio St. 137, 120 N.E. 234 (1918)), where it was said that 'what was given to him generally as a shield should not be used as a sword.'" (Citation added).

It is submitted that the constitutionally granted "privilege" to a jury trial is a "privilege" which may be waived by the accused. If the defendant wishes to waive the right to a jury and have the court sit as the trier of fact, then there is no reason why a jury should be forced upon him.

III.

ALLOWING THE JURORS TO BE CHALLENGED AND DISMISSED BY THE PROSECUTION FOR CAUSE, BASED SOLELY ON THEIR NON-BELIEF IN CAPITAL PUNISHMENT, WAS IMPROPER.

I.C. Section 19-2018 - Section 19-2020 provides for the only grounds upon which to challenge a juror "for cause". Unless such as will fall within one of the categories of the statute; the court may not allow a challenge for cause and the prosecution must use a preemptory challenge in order to dismiss the juror.

It has been stated in Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 170 (1968) that:

"It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal, orgnized to convict. (Citations omitted) It requires but a short step from that principal to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to

a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected."

Therefore, where the jury is so selected, by the allowance of a challenge for cause, based solely upon the jurors' non-belief in capital punishment, such jury has not been entrusted with the fair determination of the guilt or innocence of the defendant, but is so organized as to increase the probability of the conviction of the defendant upon a charge which will result in a mandatory death penalty.

As stated in Boulden v. Holman, 394 U.S. 478, 22 L.Ed.2d 433, 89 S.Ct. 1138 (1969):

"Two other veniremen seemed to have been excluded merely by virtue of their statements that they did not 'believe in' capital punishment. Yet it is entirely possible that a person who has a 'fixed opinion against' or who does not 'believe in' capital punishment might never-the-less be perfectly able as a juror to abide by existing law--to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case."

Therefore, there is no indication that a person who does not 'believe in' capital punishment is not perfectly able to abide by the existing law and to follow conscientiously the instructions of a trial judge. Therefore, such allowance of a challenge for cause resulted in a jury which was highly organized

to convict.

IV.

Once this Court resolves the question that I.C. Section 18-4004 is unconstitutional, then that statute must be seen as not existing for any legal purpose; but that it is void ab initio. As this Court explained in Smith v. Costello, 77 Idaho 205, 290 P.2d 742 (1956):

"An unconstitutional act is not a law and . . . confers no rights and affords no protection."

"The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed. * * * No one is bound to obey an unconstitutional law and no courts are bound to enforce it. * * * The general principles stated above apply to the constitutions as well as to the laws of the several states insofar as they are repugnant to the Constitution and laws of the United States. Moreover, a construction of a statute which brings it in conflict with a constitution will nullify it as effectually as if it had, in express terms, been enacted in conflict therewith." 16 Am Jur 2d Section 177.

"Although the courts may eliminate parts of an act as unconstitutional and sustain and give effect to the remaining portions, it is sometimes difficult to apply this process to penal statutes, because they are always construed strictly. Hence, the courts incline toward treating a penal statute as void in its entirety whenever one section or clause is clearly unconstitutional." 16 Am Jur 2d Section 196.

"An unconstitutional act is not a law." State v. Village of Garden City, 74 Idaho 513, 265 P.2d 328 (1953) at 333.

"The question whether portions of a statute which are constitutional shall be upheld while other portions are eliminated as unconstitutional involves primarily the ascertainment of the intention of the legislature. If the objectionable parts of a statute are severable from the rest in such a way that the legislature would be presumed to have enacted the valid portion without the invalid, the failure of the latter will not necessarily render the entire statute invalid, but the statute may be enforced as to those portions of it which are constitutional. If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the residue independently, and accordingly, the entire statute is invalid." 16 Am Jur 2d Section 186.

An examination of the passage of I.C. Section 18-4004 will readily prove that it was passed in connection with I.C. Section 18-4003 and is such an integral part of I.C. Section 18-4003 that the rendition of I.C. Section 18-4004 as unconstitutional automatically makes that part of I.C. Section 18-4003 which deals with first degree murder void ab initio also.

The same result is reached by another method of examination. It is general knowledge that a criminal statute without a penalty is of no effect and will be seen as void. Once the penalty for first degree murder has been held to be unconstitutional, and void ab initio, then there is no penalty for the crime, and hence there is no crime ab initio.

Regardless of which line of reasoning is used several

courts have come to the same conclusion: One cannot be convicted of a crime when the statute creating the crime is declared unconstitutional.

State v. Sulman, 165 Conn. 556, 339 A2d 62 (1973) is an ideal case, very much in point. The defendant, a physician, had been convicted of attempting to procure an abortion. During his appeal, the United States Supreme Court handed down the Roe v. Wade case which made the abortion statute under which he was convicted unconstitutional. The Court released the defendant.

"In as much as the federal courts have held that the statute pursuant to which the defendant was convicted is unconstitutional, we must conclude that the conviction cannot stand. An offense created by a statute which is unconstitutional in toto is not a crime. (cites omitted.)" State v. Sulman, supra., at 63.

Application of Boyd, 189 F.Supp. 113 (1959) affirmed in 281 F2d 195 (1959) is a federal court reaching the same conclusion. The defendant had been convicted of the Tennessee Habitual Criminal Act which was found to be unconstitutional, and the Court released the defendant on writ of habeas corpus.

"It is true that if an indictment is merely insufficient in some respects or too meager, it may not be void and may be cured upon a motion to quash by recommitment to the Grand Jury. But such a remedy is not available where the indictment itself is drawn under a void statute. If the statute itself is void it must necessarily follow that all proceedings under the statute are also void, including the indictment, the conviction, and the sentence imposed by the court." Application of Boyd, supra., at 116.

"The majority rule is that where a statute or ordinance making certain acts or omissions a

crime is unconstitutional or invalid, a final judgment predicated upon the validity of such legislation is void, generally upon the theory that the court had no jurisdiction to enter the judgment that it did.

In Harrod v. Whaley, Ky., 239 SW2d 480, a convict sought release in a habeas corpus proceeding from a judgment which, he maintained, was rendered under an unconstitutional statute. We recognized that a judgment of conviction of crime based upon an unconstitutional statute is void and held that a habeas corpus proceeding testing such conviction could be maintained. . . . We conclude, therefore, that the petitioner was and is entitled to be relieved of the void judgment and released from custody under it." Engle v. Caudill, 288 SW2d 345, 346 (1956).

In Byrd v. State, 110 So.2d 52 (Fla. 1959), the defendant was convicted and sentenced on two counts of an information. The statute was declared unconstitutional and the defendant was released.

"Since the trial of this cause, and the entry of the purported judgment, and sentence from which appeal is taken, our Supreme Court has declared the abovementioned section of the statute invalid. It therefore follows that the conviction under Count Two of the information cannot be sustained, and the sentence entered consequent thereon must be reversed. * * * An accused cannot be convicted of one crime and thereupon be adjudged guilty and sentenced for another, even though the offenses are closely related and may be of the same general character. A judgment of guilty must conform to the offense for which the defendant stands convicted by the jury." Byrd v. State, supra., at 54.

CONCLUSION

I.

Idaho Code Section 18-4004 fits the pattern of both Roberts v. Louisiana, 96 S.Ct. 3001 (1976) and Woodson v. North Carolina, 96 S.Ct. 2978 (1976) and is clearly unconstitutional as explained in Proffitt v. Florida, 96 S.Ct. 2960 (1976); Gregg v. Georgia, 96 S.Ct. 2909 (1976); and Jurek v. Texas, 96 S.Ct. 2950 (1976). None of the three requirements to uphold a death sentence are expressed in the Idaho statute.

II.

The defendant herein should be allowed the privilege of exercising his right to waive the jury and try this matter to the Court, under the conditions of prejudicial pre-trial publicity he was facing.

III.

The allowances to challenge for cause those jurors who voiced their expressions contrary to the death penalty, thereby creating a death-oriented jury, should not have been allowed.

IV.

Idaho Code Section 18-4003 is an integral part of Idaho Code Section 18-4004 and both were passed by the Idaho Legislature as a package law. Because Idaho Code Section 18-4004 is unconstitutional and there is hence no penalty for violation of Idaho Code Section 18-4003 as it pertains to first degree murder,

Idaho Code Section 18-4003 is also unconstitutional. Since Idaho Code Section 18-4003 is unconstitutional it is void ab initio and therefore the defendant has committed no crime and his conviction and sentence must be reversed and the defendant-appellant must be released.

DATED this 24th day of December, 1976.

Respectfully submitted,

ROBINSON & JONES, P. A.

By: 

BRUCE O. ROBINSON

Counsel for Defendant-Appellant

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * *

THE STATE OF IDAHO,)	
	)	S.Ct. #12224
Plaintiff-Respondent,)	
)	
-vs-	)	<u>CERTIFICATE OF MAILING</u>
)	
THOMAS EUGENE CREECH,)	
)	
Defendant-Appellant.)	
)	
)	

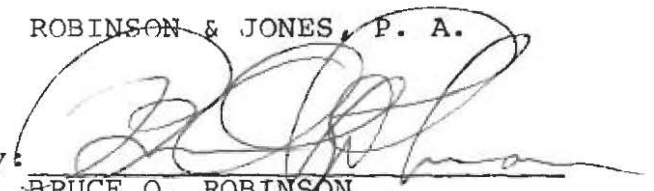
I hereby certify that I did, on the 27th day of December, 1976, serve a copy of APPELLANT'S BRIEF in the above-entitled action, upon the following:

ROBERT REMAKLUS, Esq.
Prosecuting Attorney
Valley County Courthouse
Cascade, Idaho 83611

WAYNE L. KIDWELL, Esq.
Attorney General
Room 225, Statehouse
Boise, Idaho 83720

by depositing a copy of the same in the United States mail, postage prepaid, in an envelope to each of the above-named persons at their addresses as the same are last known to me.

ROBINSON & JONES, P. A.

By: 
BRUCE O. ROBINSON
Counsel for Defendant-Appellant

1 IN THE SUPREME COURT OF THE STATE OF IDAHO

2

3

4

5 THE STATE OF IDAHO,) Supreme Court No. _____

6 Plaintiff-Respondent,)

7 vs) COURT REPORTER'S TRANSCRIPT

8 THOMAS EUGENE CREECH,)

9 Defendant-Appellant.)

10 _____

11

12

13 BEFORE

14 HONORABLE J. RAY DURTSCHI

15 DISTRICT JUDGE

16

17

18

19 APPEAL from the District Court of the First

20 Judicial District of the State of Idaho, in and for the

21 County of Shoshone.

22

23

24

25

A P P E A R A N C E S

WAYNE KIDWELL, Esq. Attorney General of the State of Idaho, Capitol Building, Boise, Idaho, for and on behalf of the plaintiff-respondent.

BRUCE O. ROBINSON, Esq., Post Office Box 8, Nampa, Idaho, appearing for and on behalf of the defendant-appellant.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

THE STATE OF IDAHO,

Plaintiff,

VS

THOMAS EUGENE CREECH,

Defendant.

Cr. No. 2165

REPORTER'S TRANSCRIPT

BEFORE

HONORABLE J. RAY DURTSCHE

DISTRICT JUDGE

BE IT REMEMBERED, That the above-entitled matter came on for hearing and trial before the Honorable J. Ray Durtschi, District Judge, with a jury, at Cascade, Idaho, May 20, 1975 through May 22, 1975, and at Wallace, Idaho, October 6, 1975 through October 22, 1975.

A P P E A R A N C E S

ROBERT REMAKLUS, Esq., Prosecuting Attorney, Cascade, Idaho, and
LYNN THOMAS, Esq., Deputy Attorney General, Statehouse, Boise,
Idaho, appearing for and on behalf of the plaintiff.

BRUCE O. ROBINSON, Esq., Post Office Box 8, Nampa, Idaho,
appearing for and on behalf of the defendant, and

WARD HOWER, Esq., Post Office Box 799, Cascade, Idaho,
appearing for and on behalf of the defendant.

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

THE STATE OF IDAHO,	)	Cr. No. 2165
)	
Plaintiff-Respondent,)	
	)	LODGMET OF COURT
vs	)	REPORTER'S TRANSCRIPT
	)	ON APPEAL
THOMAS EUGENE CREECH,)	
)	
Defendant-Appellant.)	

RECEIVED from John W. Gambee, Official Court Reporter
of the above-entitled court, and lodged with me this ____ day
of _____, 1976, original plus _____ copies of
the Court Reporter's Transcript on Appeal.

CLERK OF THE DISTRICT COURT

Deputy

1 CASCADE, IDAHO, WEDNESDAY, MAY 21, 1975, 9:30 A.M.

2
3
4 THE COURT: I will just announce before we start, if there
5 are any prospective jurors present, all the jurors should be over
6 in the American Legion Hall.

7 Counsel ready to proceed?

8 MR. REMAKLUS: The State is ready, Your Honor.

9 MR. HOWER: Defense is ready, Your Honor.

10 THE COURT: I'll direct the Clerk to draw another name,
11 then.

12 THE CLERK: Louise Bears.

13 MR. REMAKLUS: Your Honor, may I inquire? My notes
14 disclose here that we're still on juror number four; is that
15 correct?

16 THE COURT: Hazel Yoken was the last, or number four,
17 and she was excused for cause.

18 MR. REMAKLUS: Thank you.
19
20
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1 LOUISE K. BEARS,
2 a prospective juror herein, having been first duly sworn, took
3 the stand and testified as follows:
4

5 VOIR DIRE EXAMINATION

6 BY MR. REMAKLUS:

7 Q Mrs. Bears, the selection of the jury has been kind
8 of divided into two parts and the first part about which you will
9 be questioned will have reference only to pretrial publicity.
10 By this I'm referring to newspaper accounts, radio and television
11 broadcasts and the like.

12 At the outset our questions will be pretty much
13 confined to your experience with such items. Now, have you
14 followed this case in the papers?

15 A Not too thoroughly, no.

16 Q And it is not your practice to check the papers every
17 day?

18 A No.

19 Q And do I understand you to mean that you haven't
20 made any particular point of following the Creech case?

21 A No, I haven't.

22 Q Of course, Mr. Hower and I know that you are
23 Postmistress at McCall, or Postmaster for many, many years. Do
24 you -- are you in the habit of watching television in the
25 evenings, Mrs. Bears?

1 A. Not very much news. I don't get home in time.

2 Q. So, really, do you feel that you have not been
3 exposed to pretrial publicity to any extent?

4 A. Not a lot. I have seen some right at first, but not
5 for a long time, but very little.

6 Q. I know you have a busy office up there, I'm wondering
7 if you've had any particular occasion to talk about this or hear
8 this matter discussed there --

9 A. No.

10 Q. -- in the course of your work?

11 A. No, I haven't.

12 Q. You feel, then, Mrs. Bears, that you have an open
13 mind at this point?

14 A. I believe I do.

15 Q. Now, I see where you've been called, but you've
16 never served as a juror.

17 A. That's right.

18 Q. Now, if you are, you know, finally seated as a trial
19 juror in this matter, the Court will give you the instructions
20 as to what the law is, and of course, you will be bound to
21 follow those instructions. I'm sure you won't have any
22 difficulties in that?

23 A. No.

24 Q. Now, I'm sure one of the instructions are going to
25 be that your opinion would have to be based only on the evidence

1 that you would see and hear right here in the courtroom.

2 A. Yes.

3 Q I'm -- you could follow that; could you not,
4 Mrs. Bears?

5 A. I believe so.

6 MR. REMAKLUS: I'll pass the juror for cause, Your Honor.

7

8 VOIR DIRE EXAMINATION

9 BY MR. HOWER:

10 Q Mrs. Bears, you mentioned that you had read something
11 about this case a long time ago.

12 Let me ask you specifically if you read stories,
13 news stories, about this case published in the Idaho Daily
14 Statesman at any time in the last five days?

15 A. No -- I'm sorry, I did too. There was an article,
16 something about the trial, where the trial was going to be set
17 up or something just the other day. I really didn't read this
18 thing very thoroughly; it was being in Cascade and was coming up.

19 Q That story that had to do with information about
20 the trial date and so on?

21 A. Yes.

22 Q Did you read all of that news?

23 A. Yes.

24 Q Did you read all of that news story?

25 A. That one across the top of the page, yes.

1 Q Mrs. Bears, in your work you meet the public?

2 A Yes.

3 Q The whole public of McCall?

4 A Well, quite a few.

5 Q Do you have any impression at this stage as to
6 whether or not most of the public in McCall has pretty strong
7 opinions about the probable guilt or innocence of Mr. Creech?

8 A No, I don't because I have not talked to them. I
9 mean, this is not a practice in our office to visit about even
10 outside things. I mean, occasionally people come in and tell
11 you something that happens, but, other than that, why, we
12 normally are not a visiting office, we don't have time.

13 Q Do you subscribe, Mrs. Bears, to the Idaho Daily
14 Statesman?

15 A Yes.

16 Q How much time, roughly on the average, do you spend
17 each day reading the Statesman?

18 A Not very much, maybe I'll read it once a week if
19 I'm lucky and, then, I don't read everything.

20 Q Just sort of skim it for the headlines?

21 A Or the inside obituaries is what I normally look at.

22 Q Is it your statement, Mrs. Bears, that only one of
23 the stories published in the last five days in the Statesman;
24 that only one of those you have read?

25 A Yes.

1 Q Have you heard anyone, at any time, express an
2 opinion as to the probable guilt or innocence of Mr. Creech?

3 A Yes, I have.

4 Q Many times or only rarely?

5 A Occasionally, not -- I mean, just rarely when it
6 happens to come up or something come up about it.

7 Q In expressing these opinions, has anyone ever given
8 a basis for that opinion?

9 A No, not to my knowledge.

10 Q So, you've heard people say they think -- you've
11 heard people express an opinion as to his guilt or innocence,
12 but you've never heard anybody give a basis for such an
13 opinion?

14 A No.

15 Q The opinions, or opinions you've heard expressed,
16 Mrs. Bears, were they opinions that Mr. Creech was probably
17 guilty or that he was probably innocent?

18 A Most of them guilty.

19 Q Have you heard anybody express an opinion as to what
20 they think ought to be done with Mr. Creech; that is, as to
21 whether he should be hanged or not, or tried or not, or things
22 like that?

23 A Yes, I have.

24 Q How many times have you heard such opinions expressed?

25 A Oh, just a minimum of five or six times, maybe, over

1 here awhile back on this one -- where was it? California and
2 they went down somewheres in the desert; that he was being
3 taken down there to help clear up some matter or something.

4 Q What was your understanding as to why he was taken
5 down there?

6 A Be honest with you, I didn't read it all. I did
7 read part of it and he was being taken down there to -- something
8 in regards to some other type of missing person or something
9 down there. But, other than that, I honestly don't know but I
10 did read about him having to land on the highway; which was
11 quite an accomplishment, I think, for the pilot. But --

12 Q Do you feel that you are, at present, Mrs. Bears,
13 free from all prejudice for or against this defendant?

14 A I believe I am free from them.

15 Q You have no inclination to feel that either guilt
16 or innocence until you've heard the evidence?

17 A Um-hmm.

18 MR. HOWER: Pass the juror for cause, Your Honor.

19 THE COURT: Are the jurors that have been passed for
20 cause, are they downstairs?

21 VOICE: Yes, they're in the jury room.

22 THE COURT: Do Counsel see any reason why all the jurors
23 can't stay in the American Legion Hall; even though they've
24 been passed for cause? I don't really see any -- if they follow
25 these instructions given not to discuss, I think they are more

1 comfortable down there than they are downstairs.

2 MR. REMAKLUS: I have no objection. I think they have been
3 adequately admonished not to discuss their questioning here in
4 the courtroom while they've been in by themselves and I have no
5 objection.

6 MR. HOWER: I have no objection, Your Honor.

7 THE COURT: Why don't you tell the jurors that are
8 downstairs that they can go to the American Legion Hall.

9 MR. HOWER: We've both passed for cause, but we haven't
10 inquired --

11 THE COURT: Right, go ahead.

12 MR. REMAKLUS: Yes, Your Honor. Thank you.

13
14 FURTHER VOIR DIRE EXAMINATION

15 BY MR. REMAKLUS:

16 Q Now that we're past the pretrial publicity stage, I
17 have a few general questions and I'm sure Mr. Hower will have
18 some also.

19 Mrs. Bears, how do you feel about the death penalty?

20 A. I don't believe that there should be.

21 Q You do not believe --

22 A. In capital punishment, no.

23 Q Mrs. Bears, if you are selected as a trial juror and
24 the State meets the burden of proof that will be announced to you
25 by the Judge, can you arrive at a verdict based upon the evidence;

1 without regard to what the punishment might be?

2 A. I believe so.

3 Q. You understand, don't you, Mrs. Bears, that the
4 punishment is not up to you or me, that's the function of the
5 Court.

6 A. That's right.

7 Q. And that if -- and this is all we're interested in is
8 people who can keep an open mind and arrive at a decision in
9 this matter based solely on the evidence here in this room.

10 A. That's right.

11 Q. Have you made arrangements, Mrs. Bears, to be away
12 from your work as long as this matter takes?

13 A. Well, I have a clerk in charge who will take my
14 place and, if she has problems, she can contact our head office
15 in Boise and --

16 Q. Fine. So, actually, your office will be able to
17 function? All I'm concerned about is that you will be able to
18 devote your time and attention to the trial and not worry about
19 the office.

20 A. I believe so.

21 Q. Fine. I see where Mr. Bears is now working for the
22 City of McCall. How long has he worked there?

23 A. A year ago this month.

24 Q. And he's had a long-time career in forestry and
25 sawmill work, has he not?

1 A. Yes.

2 Q Mrs. Bears, would the fact that all of the State's
3 witnesses may not be what you might call pillars of the
4 community, would this bother you in determining the value of
5 their testimony?

6 A Will you clear up what "pillars of a community" is?

7 Q Well, you know in all witnesses to crimes are not
8 equivalent to the neighbor next door or the people, maybe, that
9 come from McCall Post Office. They may come from different
10 walks of life.

11 A Okay.

12 Q And my question is, will you give their testimony
13 your undivided attention and evaluate it?

14 A Yes.

15 Q Evaluate their truths and veracity based on the
16 Judge's instructions?

17 A Yes.

18 Q Fine. Thank you. Do you have a strong moral or
19 religious conviction about the death penalty, Mrs. Bears?

20 A Not a strong one, I just don't believe in it, really.

21 Q You don't think this would trouble you with
22 reference to arriving at a decision in this case?

23 A No, I don't.

24 MR. REMAKLUS: We'll pass the juror for cause, Your Honor.
25

1 FURTHER VOIR DIRE EXAMINATION

2 BY MR. HOWER:

3 Q Mrs. Bears, I'm interested in your certain views a
4 little further; your feelings about the death penalty.

5 You mentioned that you do not have a strong
6 religious feeling about it. Could you state in your own words
7 the key reason, or reasons, why your -- you have reservations
8 about the death penalty?

9 A Because I believe everyone has a right to live and
10 they was put in this world for life and that's why they should
11 be -- maybe it's religious, until God comes and takes us for his
12 own. I'm not a religious-type person, in one sense I'm
13 religious, but not to the point of being very strong about it.

14 But, I believe everybody has a right to live;
15 although I do believe in our laws, I mean, our laws are set up
16 in our state are such that that's the outcome of these things,
17 why, it's not my responsibility, I mean, other than the fact to
18 proven guilt, somebody proves the fact and proven somebody -- the
19 way I look at it, whether they are guilty or not guilty.

20 But, I do believe that everybody should have a right
21 to live. I don't believe in taking anybody's life, to be honest
22 with you.

23 Q I think I understand.

24 You mentioned, Mrs. Bears, that you don't think of
25 yourself as a powerfully, strongly religious person.

1 A. No.

2 Q. I don't say this to intimidate you at all, but I
3 need to inquire. You are aware that you are under oath?

4 A. Yes.

5 Q. That you and all the other jurors were sworn?

6 A. Yes.

7 Q. Do you feel, Mrs. Bears, that when you take the
8 solemn oath, if you should violate it, do you feel that there is
9 any divine sanction or punishment for violation of that oath; or
10 the only sanction or punishment is that imposed by civil
11 authority?

12 A. Maybe I'm religious. I believe in divine.

13 Q. You think there is?

14 A. I think that there is, otherwise have punished
15 people for false indignation as well as our courts. Maybe I'd
16 better clarify my idea of religion.

17 Being strongly religious is going to church and
18 doing all these things physically. I do believe in God and --

19 Q. That's what I'm concerned about, Mrs. Bears, as to
20 whether the oath, to put it bluntly, has a religious hold on
21 you; whether you fear the punishment of God, if you take an
22 oath and violate it deliberately and intentionally.

23 A. Well, yes.

24 Q. Bearing that in mind, Mrs. Bears, do you approach
25 the duty of sitting on the jury which will judge the guilt or

innocence of Thomas Creech with an attitude of open mindedness and fairness towards him?

A. Yes.

Q. Without having prejudged the question?

A. Yes.

MR. HOWER: I pass this juror for cause, Your Honor.

THE COURT: All right, you may go back over to the American Legion Hall. I'll ask you, do not discuss any of the questioning here that took place with the other jurors or discuss any of the questions. Thank you.

State's second pre-emptory.

THE CLERK: Shirley Brandenburg.

SHIRLEY BRANDENBURG,
a prospective juror herein, having been first duly sworn, took the stand and testified as follows:

VOIR DIRE EXAMINATION

BY MR. REMAKLUS:

Q. Mrs. Brandenburg, the questions that we're going to ask you here at the beginning of the process of the jury selection are going to be confined to pretrial publicity; by this I'm referring to newspaper articles, television broadcasts, conversations that you may have participated in or overheard and so on.

1 Now, keeping this in mind, the first part of the
2 questioning is going to be limited to this and please don't be
3 afraid to answer the questions fully and honestly. If you need
4 explanation of a question, why, don't be -- don't hesitate to
5 express yourself.

6 A. All right.

7 Q. Have you followed the Creech case in the daily
8 papers?

9 A. Yes, I have.

10 Q. Have you made it any particular point of following
11 it?

12 A. Yes, I think so because it happened close.

13 Q. And have -- how recently have you read the papers?

14 A. About Sunday -- oh, before that, you mean?

15 Q. Well, you read Sunday's papers?

16 A. I did.

17 Q. Um-hmm. And did you read all of the article in it?

18 A. I don't think so, just the headline and --

19 Q. Has this -- let me ask you this: Have you followed
20 this, tended to follow it more closely since you have been
21 summoned as a juror?

22 A. No, I've read, probably, every article before.

23 Q. Okay. Now, what about you folks? Watch television?

24 A. Not since I've been told not to.

25 Q. Well, I understand that, yes. But, I mean before

1 the Judge's admonition, before the Judge told you not to.

2 A. Oh, yes.

3 Q. You've seen -- have you seen news broadcasts of this
4 case?

5 A. If they were on, I probably did.

6 Q. Have you participated in conversations about this
7 matter; other than, say, at home?

8 A. Right after it happened, probably a few people.

9 Q. Now, the fact that you have read about this in the
10 papers and, perhaps, have discussed it early when it first
11 became publicized, have these caused you to have any opinions
12 one way or the other as to the guilt or innocence of this
13 defendant?

14 A. I think so.

15 Q. You think that these opinions are such that it would
16 take evidence produced here in the courtroom to change them?

17 A. I don't think they would be changed.

18 Q. You have a fixed opinion at this time?

19 A. I'm pretty sure.

20 MR. REMAKLUS: I'll pass the juror for cause, Your Honor.
21
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23
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VOIR DIRE EXAMINATION

BY MR. HOWER:

Q Mrs. Brandenburg, how long ago did you receive the summons that you were called for jury duty in this case?

A I believe it was last Wednesday night.

Q Last Wednesday night?

A Yes.

Q Since that time have you had any conversations with anybody --

A Well --

Q -- let me finish the question. I know you've had some conversations.

Have you had any conversations with anybody about what you can say or not say or how you should act in order to be chosen for the jury or excused for jury duty?

A I don't know. I mean, other than that was this case that's coming up and I can't remember.

Q Have you talked with anybody since you received the summons about what kind of questions you would be asked on this examination?

A No, I didn't know what kind of questions, no.

Q Have you heard any talk among the jurors and I --

A No.

Q -- I haven't asked the question.

A We're not supposed to talk about it.

1 Q. You are not supposed to talk about the case and we
2 all assume that you are not talking about the case.

3 A. Yeah.

4 Q. Have you heard any talk among the jurors on how to
5 get on the jury or stay off the jury?

6 A. No.

7 Q. None whatever?

8 A. No.

9 MR. HOWER: Your Honor, I challenge the juror for
10 cause.

11 THE COURT: Just for the record here to pursue the
12 questions that Mr. Hower was just asking you, I would expect
13 that no jurors would want to sit on this particular case or
14 look forward to it, really.

15 But, to explore this for the record, can you tell me
16 any specific facts that stand out in your mind that you heard
17 about the case that have caused you to form the opinions you
18 say you have?

19 THE WITNESS: Well, I have read everything about it in
20 the newspaper ever since it happened and --

21 THE COURT: Are there any specific facts that you read in
22 the newspapers that stand out in your mind?

23 THE WITNESS: Do you want me to --

24 THE COURT: Yes, I want you to tell me what you've read
25 and remember about it that caused you to have this opinion.

1 THE WITNESS: Because of the bodies that were found -- I
2 forget the states, couple of states.

3 THE COURT: About other states you say?

4 THE WITNESS: Yes, there were, and --

5 THE COURT: Those are the kinds of facts I'm interested in,
6 what you remember in your mind.

7 THE WITNESS: Yes.

8 THE COURT: That stands out in your mind. Anything else?

9 THE WITNESS: And they were looking for more and because
10 of what was, you know, said and --

11 MR. HOWER: Before the Court rules on the challenge,
12 could I have permission to follow up with a question or two?

13 THE COURT: Yes.

14 MR. HOWER: Thank you.

15

16 FURTHER VOIR DIRE EXAMINATION

17 BY MR. HOWER:

18 Q Mrs. Brandenburg, you've stated that you have read
19 everything available about this case?

20 A. Yes.

21 Q Have you also discussed it with your husband?

22 A. Before I knew that I was going to be called?

23 Q. Yes.

24 A. Yes, I have.

25 Q All of the questions I'm about to ask refer,

1 Mrs. Brandenburg, to the time before you received your summons
2 to serve on the jury.

3 A. Yes.

4 Q. Did you discuss the case extensively with friends
5 and acquaintances here in Valley County at that time?

6 A. Extensively? We talked about it after it happened.

7 Q. Yes.

8 A. Yes.

9 Q. Would you say you heard a good bit of talk about it?

10 A. I have.

11 Q. Yes. Have you heard friends or acquaintances
12 express opinions as to the probable guilt or innocence of
13 Mr. Creech?

14 A. Oh, some have and some haven't.

15 Q. Some have and some have not?

16 A. Yeah.

17 Q. Are you able to quantify that? Are you able to
18 say that many of your friends and acquaintances have expressed
19 an opinion or that only a few have or what?

20 A. Probably just a few. I don't think I've talked that
21 -- I just read it and, you know, I followed it because it did
22 happen here. If it happened in another state, I don't think,
23 you know, I would be -- would have read about it.

24 Q. Have you and your friends discussed the newspaper
25 stories about crimes attributed to Mr. Creech in other states?

1 A. Don't think so. Can't remember.

2 MR. HOWER: Okay. Thank you, Mrs. Brandenburg.

3 THE COURT: I'm going to grant the challenge. We don't
4 want you to feel, Mrs. Brandenburg, that you are shirking your
5 duties by telling us these things or because you read them in
6 the papers; that's natural and we're not criticizing you for
7 doing that. In fact, we appreciate your frankness and honesty
8 about it.

9 We'll excuse you now. We have to have another
10 jury here on June the 5th at 10:00 for another trial.

11 So, you'll be excused at this time. Until then, if
12 you'll remember that date.

13 THE WITNESS: I'll have to come back June 5th?

14 THE COURT: Yes, on June 5th at 10:00 unless the Clerk
15 gets in touch with you at another time.

16 Thank you for your appearance this morning.

17 THE CLERK: Mary Lou Droge.

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1 MARY LOU DROGE,
2 a prospective juror herein, having been first duly sworn, took
3 the stand and testified as follows:
4

5 VOIR DIRE EXAMINATION

6 BY MR. REMAKLUS:

7 Q Mrs. Droge, in our selection, or questioning of
8 prospective jurors, it's been divided into two parts and the
9 first part of our questioning is going to be with reference to
10 pretrial publicity and in this regard I'm referring to
11 newspaper articles, television, radio broadcasts, conversations
12 and things of that nature.

13 Now, keeping that in mind, I'd like to ask you if
14 you have followed this case in the papers?

15 A Yes, I have.

16 Q And have you heard or watched the television
17 broadcasts about it?

18 A Yes, but I did not last night.

19 Q I understand that. I'm talking about before the
20 Judge admonished everybody to be careful about that.

21 Did you make it any particular point to follow this
22 case in the papers?

23 A Just a matter of interest in any case like that.

24 Q The fact that it happened in this county; did that
25 cause you to take more interest in it than if it would have

1 happened someplace else?

2 A. Yes, if it probably happened someplace else, I
3 wouldn't have read so much about it.

4 Q. If -- in view of this, do you have any opinion one
5 way or the other with reference to guilt or innocence in this
6 particular case?

7 A. Well, the things that I've seen on TV and read, I
8 feel a little bit biased. The information seems to be more
9 heavily weighted in one direction than the other.

10 Q. Have you ever talked to anybody that purported to
11 know the facts of the case?

12 A. No.

13 Q. And any opinion one way or the other that you
14 might have at this time, then, would just be based on
15 newspaper articles or television?

16 A. Yes. Then, I've just discussed it with my husband.

17 Q. And put it -- I guess, to put it plainly, you don't
18 believe everything you read in the newspapers, do you?

19 A. Right.

20 Q. Thank you. You understand, of course, that
21 newspaper articles are not necessarily based upon investigations
22 that could be -- that they are --

23 A. Um-hmm.

24 Q. -- I'm sure you know what I'm talking about,
25 Mrs. Droge.

1 A. Yes.

2 Q. You think you are in a frame of mind now that would
3 prevent you from being fair and impartial in this case if you are
4 finally selected as a juror?

5 A. Well, I would hope that I could be fair in judging
6 the facts. I will say it's going to be hard to get some of
7 these ideas out of my head, though.

8 Q. If you are selected here, I notice that you've never
9 served on a jury before.

10 A. Right.

11 Q. Now, if you are chosen as a trial juror the Judge
12 will instruct you as to what the law is in this case and you
13 must follow the law whether you might disagree with it or not.
14 That is the law.

15 Would you have any difficulty in that, Mrs. Droge?

16 A. Well, I'd try to follow the law but, you know, I --

17 Q. This is a complex thing we're talking about and we
18 all know that. But, you would be instructed by the Judge as
19 to what the law is and, then, in your deliberations as a juror,
20 of course, your duty as a juror would be to determine the facts
21 and that is the fact of guilty or not guilty.

22 A. Yeah, I realize that.

23 Q. And the law is going to be stated to you by the
24 Judge and you are bound by that.

25 A. Um-hmm.

1 Q I'm sure you understand that, don't you?

2 A Yes.

3 Q Now, keeping in mind the questions I've asked you,
4 do you think, if you are selected here as a juror, that you
5 could base your decision in this case on the evidence that you
6 would get here in the courtroom?

7 A I've been wrestling with that question in my own
8 mind. Like I say, the facts that are not the facts, the
9 information that's been doled out seems -- well, it seems like
10 he's already been judged as far as the reports are concerned
11 and I really think it would be difficult for me to obscure all
12 this from my mind. But, I would do my very best to give a
13 just, a real unbiased opinion if I, you know, I would do my
14 best.

15 MR. REMAKLUS: I have no further questions, Your Honor.

16

17 VOIR DIRE EXAMINATION

18 BY MR. HOWER:

19 Q Mrs. Droge, you are, I'm sure, aware of the
20 principle in the Anglo-Saxon legal system that a person is
21 presumed innocent until he's proved guilty?

22 A Yes.

23 Q As you sit there, Mrs. Droge, are you able to
24 presume this defendant to be innocent?

25 A Not right now.

1 Q Not right now?

2 A No.

3 Q Let me inject another ingredient, Mrs. Droge, into
4 your thinking --

5 A Okay.

6 Q -- to see if it changes it.

7 Are you aware, or have you thought about the fact
8 that in every determination of guilt or innocence it is
9 necessary to consider, not only what happened, not only the
10 events, but why it happened; the motives?

11 Do you feel that you have information in your
12 possession which has led you to the conclusions as to the motives
13 for the events you believe to have happened?

14 A Yes.

15 Q You feel you know why it was done?

16 A Well, this is purely rumor and I don't recall reading
17 it or seeing it on TV. But, it was brought to my attention that,
18 possibly, it had been through the use of drugs.

19 Q What?

20 A Through the use of drugs that had instigated this
21 act.

22 Q Have you arrived on the basis of the information you
23 have -- have you arrived at a conclusion on that point,
24 Mrs. Droge?

25 A Only that I feel that this sounds very possible to

1 me because I feel drugs cause people to do things that they
2 would not normally do under normal circumstances. I feel that
3 this could very possibly have been.

4 Q If you were selected as a juror in this case and
5 took the oath which states that they will well and fairly try
6 the case on the basis of evidence and the law --

7 A Um-hmm.

8 Q -- as stated by the Court. Are you prepared to
9 make a conscientious effort to do that?

10 A I would be very conscientious about trying to look
11 at all the information given me and in a fair manner. I would
12 want somebody to do this for me if I were in that position and --

13 Q I think that's all we can ask.

14 I pass this juror for cause, Your Honor.

15 THE COURT: Mrs. Droge, let me just, for my own
16 information, ask you to tell me what ideas you have in your
17 mind that you would have to get out to -- in other words, at
18 one point you made a statement it would be hard for you to get
19 the ideas out of your head that you have.

20 I would like for you to just spell out for me,
21 come right out and tell me the details that you've read or heard
22 that really are in your mind now and fixed in your mind that
23 cause you to have this opinion that you have formed.

24 THE WITNESS: Well, it's hard for me to believe that
25 someone that has been -- whose name has been connected with so

1 many incidents other than the one that we're dealing with here,
2 that there must be something.

3 THE COURT: That's the thing that stands out in your
4 mind?

5 THE WITNESS: Yes, you know, the fact I could -- I would
6 find it much easier, I think, to deal with this more
7 conscientiously and fairly if, in the back of my mind I didn't
8 know that this person was connected with other of the various
9 same type of acts.

10 THE COURT: You are talking about in other states?

11 THE WITNESS: Yes, in other states and it seems, you
12 know, one incident, maybe there's a good excuse but others,
13 I think, oh boy, you know, I feel sorry.

14 THE COURT: Okay, appreciate that and we appreciate your
15 frankness here, Mrs. Droge.

16 If you will not discuss with the other jurors at
17 all what questions we asked here or what was said we'd appreciate
18 it. You may go back to the American Legion Hall at this time.

19 MR. HOWER: Now, I understand the Court is excusing this
20 juror?

21 THE COURT: No, if you are not going to challenge her.

22 MR. HOWER: No challenge has been made.

23 MR. REMAKLUS: No challenge has been made, but we're not
24 concluded with our voir dire examination.

25 THE COURT: I'm sorry, go ahead.

1 THE WITNESS: So I stay?

2 THE COURT: I forgot, have to go through some other
3 matters we want to ask you first.

4

5 FURTHER VOIR DIRE EXAMINATION

6 BY MR. REMAKLUS:

7 Q Now that we've sort of gone over the pretrial
8 publicity aspect, we do have some other questions.

9 Now, do you think that the intentional use of drugs
10 by an individual would excuse the commission of a crime?

11 A No.

12 Q Do you have -- you and Dr. Droge have been at
13 McCall for five years, I see?

14 A Yes.

15 Q The attorney-client relationship between you and
16 Dr. Droge and my office has been concluded; hasn't it?

17 A Yes.

18 Q How do you feel about the death penalty, Mrs. Droge?

19 A I hate to see it used and, yet, if it happens to be
20 true that this fellow has been involved in these many crimes,
21 I feel that there really is no place in society for him and,
22 then, I think the death penalty has its place.

23 Q Mrs. Droge, if you are selected, you know, as a
24 trial juror to listen to the evidence in this case, the
25 evidence in this case is going to be concerned with the Idaho

1 events.

2 A. Um-hmm, I realize that.

3 Q And, now, if the State meets the burden of proof
4 that will be charged by the Judge, based only on the Idaho
5 events, will you be in a frame of mind to fairly judge guilt or
6 innocence of this defendant based only on the Idaho events?

7 A. Yes, I would like to see him have a fair trial on
8 these other events also.

9 Q Now, would the fact that Dr. Droge is a dedicated
10 physician and dedicated to prolonging of human life and relief
11 of suffering; would that give you any trouble with reference to
12 the death penalty?

13 A. I've never -- no, I don't think there's been any
14 connection there.

15 Q You understand that what the law is is established
16 by the legislature and that's the way, that isn't your function
17 as a juror; to determine the punishment.

18 A. Um-hmm.

19 Q Mrs. Droge, having followed the papers, are you
20 aware of the fact that the validity of the death penalty is
21 now before the United States Supreme Court?

22 A. Yes, but I really haven't followed it closely
23 enough to know, really, particulars on it.

24 Q But you do know that it's undecided as to whether
25 it would be carried out?

1 A. Yes.

2 Q. If you are selected here as a juror, have you made
3 any arrangements for the children to be cared for?

4 A. That's a problem, it really is. I can make
5 arrangements easily enough for daytime care for the children
6 and, if it were on into the evening for a short period of time.
7 But, they would have to be a 24-hour-type of service they'd be
8 under because of the fact that Eddy goes in and out during the
9 night constantly and he would not be able to watch them at
10 night. So, at this time I really don't know who I could leave
11 them with for an extended period of time for 24 hours a day
12 because there would be one day a week when they'd be able to be
13 under his care and --

14 Q. This would present a real problem, then; would it
15 not?

16 A. Yes. Like I say, daytime and this is what I had
17 in mind when I filled out that questionnaire, I can make
18 arrangements during daytime. But, yesterday it was brought to
19 my attention and that was the first I had really realized that
20 this could happen; that in the case like this then be away from
21 the children, or away from home for two, three or more days.

22 So, I really -- I've been thinking hard about it as
23 to what I would do and I think it's -- it would be very
24 difficult with his hours being so unpredictable. If they were
25 set hours when we were home and if he could watch them from

1 ten at night until seven in the morning, it would be helpful.
2 But, I'm not sure what I would do.

3 Q Dr. Droge customarily receives night calls; does he
4 not?

5 A Yes, he's in and out. Some nights no, but other
6 nights two or three times. So, he can't call somebody to come
7 over quick at two in the morning.

8 Q And I see the children are age two and four years;
9 that is correct, isn't it?

10 A Yes.

11 Q Mrs. Droge, I know that you are well aware of the
12 fact that being on a jury is one of the obligations and duties
13 of citizenship.

14 A Yes.

15 Q And I'm wondering this: That because of the
16 difficulty in having the children properly cared for, if this
17 would create a hardship for you in giving the trial your
18 undivided attention.

19 A I think I'd be rather concerned about any girls,
20 very bluntly I'll say it, that I would have them in the back of
21 my mind wondering how they were doing if it lasted for longer
22 than, you know, three days or so.

23 I'd be pretty up tight about it because I just don't
24 leave my children that much and to think that they were not even
25 being able to see me for that length of time, I'd be a little

1 concerned about it.

2 MR. REMAKLUS: I'm sure you would.

3 THE WITNESS: I understand it is a citizen's obligation
4 and a duty and I appreciate this in our system of law and I'll
5 admit I was -- I had mixed emotions when I received this
6 notification that I would be called on jury duty. At that time
7 I didn't know this case was coming up or any other case and I
8 looked on it as a learning experience for myself and I'm so dumb,
9 I guess I didn't realize that it could be overnight-type of
10 thing and, so, the girls, I didn't -- hadn't given me any
11 concern. I hadn't thought about it until yesterday.

12 Q BY MR. REMAKLUS: Well, this is an unusual situation
13 so please don't consider that you've caused any oversights for
14 yourself.

15 A Well --

16 Q Because this is, you know, a --

17 A I really feel dumb about courtroom procedures and
18 the whole thing.

19 Q Mrs. Droge, where did you go to school; receive
20 your education? I see you were a teacher.

21 A Jamestown, North Dakota; which is a Presbyterian
22 affiliated college.

23 Q And when were you graduated from there?

24 A '61.

25 Q 1961?

1 A. Um-hmm.

2 Q And did you teach for a few years before you and
3 Dr. Droge were married?

4 A No, we were married after I graduated and I began
5 teaching that very year.

6 Q How long did you teach?

7 A Either six and a half or seven and a half years.

8 Q What grades did you customarily teach?

9 A Mostly junior high and, then, I had some experience
10 in elementary.

11 Q And where did Dr. Droge go to school?

12 A His undergraduate work was done at Jamestown College
13 and Medical School at -- first two years University of North
14 Dakota and last two years University of Oregon.

15 Q And where did he put in his residency prior to
16 coming to McCall?

17 A Santa Rosa, California.

18 Q So, you and Dr. Droge came from the same place in
19 North Dakota?

20 A No, he's a Montanan and I'm a Minnesotan.

21 Q You met at school, is that right?

22 A Right.

23 MR. REMAKLUS: I'm going to pass the juror for cause,
24 Your Honor.

25

1 FURTHER VOIR DIRE EXAMINATION

2 BY MR. HOWER:

3 Q Mrs. Droge, I don't want to insult you by suggesting
4 that any past relationship between you or your husband -- any
5 relationship between you and your husband and Mr. Remaklus would
6 influence your judgment on a murder case, but I do need to know
7 how long it has been since that relationship existed and what
8 the general nature of it was.

9 A. Well --

10 Q If this is not confidential or private or anything
11 like that.

12 A. We have two little girls who are adopted and he
13 was our attorney.

14 Q He was your attorney in connection with the
15 adoption?

16 A. Yes.

17 Q How long ago was that work finished?

18 A. Well, we just made our final payment last month and
19 Lisa was adopted in the courtroom a year ago April.

20 Q Okay. It's not pending, the work is finished?

21 A. No, the work is complete.

22 Q I don't care whether it's paid for or not, just so
23 the matter is not anything that could possibly be on your mind --

24 A. No.

25 Q --- in connection with this trial.

1 A. No.

2 MR. HOWER: I pass this juror for cause, Your Honor.

3 THE COURT: Let me ask you this, Mrs. Droge, in
4 reference to your children.

5 Is it feasible at all, do you feel at this point,
6 that your husband or you -- you would have some time, I mean,
7 could make 24-hour arrangements if it was just necessary?

8 THE WITNESS: Oh, I'd do my best to find one. But, right
9 now, I just can't guarantee that I could find somebody and
10 there's no way that I can rely on my husband to watch them, you
11 know, for any period of time.

12 THE COURT: I understand, I'm thinking of getting
13 somebody else.

14 THE WITNESS: And there just aren't that many people in
15 McCall that do that sort of thing and --

16 THE COURT: I see.

17 THE WITNESS: -- it's hard enough to find somebody if
18 you are going to go down to Boise overnight or something. So,
19 if this is an extended type of thing, which I understand that it
20 very well could be, I find it very hard in my heart to have to
21 burden my friends with passing the girls around until the thing
22 is all over.

23 THE COURT: Do you think your friends might sort of
24 share it as a civic duty?

25 THE WITNESS: I think they would if, you know, it really

1 came down to that and right now I hate to even ask them because
2 Christy is sick, but -- and the lady who is a possibility I
3 know is already obligated for this coming weekend to other
4 people and I would hate to have her take care of my sick daughter
5 along with these other well children she's obligated for.

6 THE COURT: Okay. Thank you. We'll ask you, as I said
7 before prematurely, don't discuss the questioning here or
8 anything with the other jurors. We'll ask you, then, to go back
9 to the American Legion Hall.

10 THE WITNESS: Okay.

11 MR. REMAKLUS: Are you ready for the defendant's next
12 pre-emptory?

13 THE COURT: Yes.

14 THE CLERK: Robert Williamson.

15
16 ROBERT O. WILLIAMSON,
17 a prospective juror herein, having been first duly sworn, took
18 the stand and testified as follows:

19
20 VOIR DIRE EXAMINATION

21 BY MR. REMAKLUS:

22 Q Mr. Williamson, the process of jury selection in
23 this case has kind of been divided into two parts and the first
24 part of the questioning that we will engage in has to do with
25 pretrial publicity; that is, newspaper articles, radio and

1 television broadcasts, conversations that you may have
2 overheard or engaged in; things of this nature.

3 Now, keeping this aspect in mind we're going to try
4 to, you know, within reason, confine our questions to this
5 part of it.

6 Now, have you followed the Creech case in the
7 papers?

8 A. Yes.

9 Q. Have you followed it on television?

10 A. Yes.

11 Q. Now, with reference to following it in the papers,
12 would you explain what you mean by that? Give us an idea of --

13 A. I read the articles in the Statesman and in our
14 local paper.

15 Q. And how long have you followed it in the Statesman?

16 A. Since it was started.

17 Q. You -- do you have any recollection of the
18 specific articles or anything like that?

19 A. You want me to quote as much as I can remember of
20 it? Is this what you are getting at?

21 Q. Well, I don't want to quote as much, Mr. Williamson,
22 is whether or not that you formed any opinion as a result of
23 your exposure to this publicity.

24 A. I've digested the material that was in the paper.
25 Now, I can't tell you if that information was true or not if

1 that's what you mean.

2 Q In other words, you're well aware of the fact that
3 there is some newspaper reporter's version of what may have
4 happened?

5 A Yes.

6 Q And you know that this isn't necessarily based on
7 fact or on results of investigations; this is newspaper
8 reporting only.

9 A I assume there's two bodies found down here in
10 Donnelly.

11 Q Yes, certainly. I suppose you are like the rest of
12 us and watch the television occasionally; do you not?

13 A Yes, I do.

14 Q Have you seen the news broadcasts of this matter?

15 A Yes.

16 Q Now, in your work, of course, I know that you are
17 a building contractor and have been for a number of years in
18 McCall. You get around quite a little bit. Have you been
19 exposed to conversations around the community of -- about this
20 matter?

21 A I suppose so. I don't recall any lengthy details
22 of conversations about this, but --

23 Q Now, bearing in mind that you have been exposed to
24 this somewhat, if you are finally selected as a trial juror in
25 this case, could you give the State and the defendant a fair

1 and impartial decision based only on the evidence that would
2 be produced here in the courtroom?

3 A. I think so.

4 MR. REMAKLUS: I'll pass the juror for cause.

5 THE WITNESS: Beg your pardon?

6 MR. REMAKLUS: Mr. Hower will now ask some questions.

7 THE COURT: Just a little term we use.
8

9 VOIR DIRE EXAMINATION

10 BY MR. HOWER:

11 Q Mr. Williamson, in your every day experience, most
12 of what you read in the newspaper is, in fact, true; is it not?

13 A Be a question with the Statesman. I don't agree
14 with a lot of their --

15 Q When you read in the Statesman that somebody was
16 born in St. Al's Hospital yesterday or the day before, you take
17 that as fact; do you not?

18 A Yes.

19 Q If you read in the Statesman that the score of a
20 basketball game against the Bullets and Warriors last night was
21 91 to 92 --

22 A They're reasonably accurate in that.

23 Q Did you read in the Statesman that Mr. Creech has
24 been charged with murder in other states?

25 A I'm not sure I remembered it as being charged, but

1 as being investigated.

2 Q You don't remember reading that he is charged with
3 a -- two specific murders in the State of Oregon?

4 A No, I don't remember them being charged.

5 Q Do you remember reading in the Statesman,
6 Mr. Williamson, that Mr. Creech was involved in a forced
7 aircraft landing enroute back from California a few weeks ago?

8 A No.

9 Q You didn't read that?

10 A No.

11 Q Do you remember hearing about it from anybody?

12 A No.

13 Q Do you now have, Mr. Williamson, an opinion as to
14 the probability or lack of it that Mr. Creech has been
15 involved in serious offenses in other states?

16 A I think he probably has.

17 Q Accepting that as your present belief on that
18 subject, does that affect your present impression as to whether
19 or not he is probably guilty of the offenses charged with --
20 that he's charged with here?

21 A I wouldn't say he's guilty until he's proven
22 guilty.

23 Q I understand that and I would expect that,
24 Mr. Williamson. But, I'm asking you whether the information
25 you have which you have said leads you to consider it probable

1 that he's involved in serious crimes in other states, does this
2 lead you to consider it probable than you would otherwise?

3 A. Yes.

4 Q. You understand, Mr. Williamson, that in the English
5 and American legal system every person is entitled to a
6 presumption of innocence.

7 A. Yes.

8 Q. He is presumed innocent until he is proved guilty.

9 A. That's right.

10 Q. And by "proved guilty" we mean by admissible
11 evidence presented in a court of law; not by what one reads in
12 the newspaper.

13 A. That's true.

14 Q. You understand that?

15 Now, are you now in a frame of mind, Mr. Williamson,
16 with respect to Mr. Creech so that you can honestly give him the
17 full benefit of that presumption if you sit on this jury?

18 A. I think I'm prejudiced. I think I would consider
19 the things that I've read in the paper. I probably would always
20 have a doubt in my mind that he would probably be guilty.

21 MR. HOWER: I appreciate your candor, Mr. Williamson.

22 I challenge this juror for cause, Your Honor.

23 THE COURT: You take exception to the challenge,
24 Mr. Remaklus?

25 MR. REMAKLUS: I have another question or two I'd like to

1 ask, if I may.

2 THE COURT: Go ahead.

3

4 FURTHER VOIR DIRE EXAMINATION

5 BY MR. REMAKLUS:

6 Q Mr. Williamson, if you were accepted as a juror and
7 if you are instructed by the Judge, and I notice here you have
8 not been a juror before; have you ever been a juror?

9 A No, I have not been a juror before.

10 Q I couldn't remember either.

11 If the Judge is going to instruct you as to what
12 the law is and you must follow the Judge's instructions as to
13 what the law is as applies to this case.

14 A Yeah.

15 Q Now, I'm sure you can follow those instructions and
16 will listen carefully.

17 Now, if the Judge instructs you, Mr. Williamson,
18 that your decision in this case must be based solely and only
19 upon the evidence produced here in the courtroom, could you
20 follow that instruction?

21 A I think I could follow those instructions, yes.

22 MR. REMAKLUS: I would resist the challenge, Your Honor.

23 THE COURT: Let me just ask you a couple of questions,
24 Mr. Williamson.

25 You were asked -- I think Mr. Remaklus when he was

1 asking particular questions when he wanted to know what you
2 read in the paper what you remember about it. I'd like you to
3 tell me what you remember reading that has caused you to have
4 the feeling you've expressed to Mr. --

5 THE WITNESS: I can't repeat for verbatim, but the gist
6 I got out of the papers was that these two people were found in
7 a ditch by Donnelly and he'd -- also they suspected Creech and
8 an accomplice that he did, also, perhaps, kill someone in
9 Oregon and I formed an opinion at that time if he probably,
10 very likely, had done this too, if he was tried with it. But,
11 if they could prove that he was up here and --

12 THE COURT: I'd just like to go through all the facts.
13 Any other facts that you remember reading that stand out in
14 your mind now as having caused you to have these opinions?

15 All I'm trying to ask is your memory of what you
16 read.

17 THE WITNESS: There was other things in the paper about
18 locating bodies someplace else in Arizona -- Nevada or someplace.

19 THE COURT: These are the things that stand out in your
20 mind as having caused you to have these feelings?

21 THE WITNESS: Right.

22 THE COURT: You told Mr. Remaklus you felt you could
23 follow that one instruction in deciding the case to the
24 defendant. You also, as I interpret what you said when
25 Mr. Hower -- you'd have a problem giving the defendant a

1 presumption of innocence because of what you read.

2 THE WITNESS: Well, with what -- I have an opinion
3 already from what I've read.

4 THE COURT: What I'm going to ask you, would it take some
5 evidence to remove those opinions to indicate that he was
6 really innocent?

7 THE WITNESS: I think it probably would.

8 THE COURT: What I'm trying to get --

9 THE WITNESS: To be perfectly honest --

10 THE COURT: Start out with a clean slate, or would he
11 have to sort of prove he was innocent?

12 THE WITNESS: I think, to be absolutely frank, he'd
13 have to prove he's innocent with me and I can see where that's
14 not proper.

15 THE COURT: We appreciate very much your candor,
16 Mr. Williamson. I don't want you to feel this is what we wanted
17 you to tell us, just how you felt about it and I don't want you
18 to feel that you shirked your duties by doing this because you
19 haven't.

20 But, we will excuse you because of this. We do
21 have another trial scheduled on June the 5th at 10:00 if it's
22 not settled. Otherwise we'll ask you to appear at that time.

23 THE WITNESS: Thank you.

24 THE CLERK: Thelma Jarvis.

25 THE COURT: Just a minute. I think we'll take a

1 ten-minute recess at this time.

2 We'll be in recess for ten minutes.

3 (Recess taken.)

4 THE COURT: Apparently the last name drawn hasn't been
5 served so we'll have to draw another name.

6 MR. REMAKLUS: Your Honor, that was Thelma Jarvis that
7 was not served?

8 THE COURT: Yes.

9 THE CLERK: Del Woodward.
10

11 DEL WOODWARD,
12 a prospective juror herein, having been first duly sworn, took
13 the stand and testified as follows:
14

15 VOIR DIRE EXAMINATION

16 BY MR. REMAKLUS:

17 Q Mr. Woodward, in the jury selection in this case
18 we've kind of divided it into two parts and the first part of
19 it is going to be with reference only to what we call pretrial
20 publicity and by this I'm referring to television broadcasts,
21 conversations that you may have overheard or participated in
22 and newspaper publicity and things of that nature.

23 Now, have you followed this case in the papers?

24 A Well, not too much. I have read it, but I haven't
25 dwelled on it, no.

1 Q You made no particular note of it, then, as far as
2 following it?

3 A Not any more than the rest of it.

4 Q Do you watch TV news in the evening?

5 A Not very often, sometimes.

6 Q Now, if you are selected here as a juror in this
7 case, and I notice you've never been a juror before, have you,
8 Mr. Woodward?

9 A No, sir.

10 Q Now, if you are selected the Judge is going to
11 read the instructions and in the instructions it will give you
12 the law of this case and you'll have to follow those instructions,
13 Mr. Woodward.

14 A Right.

15 Q Now, I'm sure one of the instructions will be that
16 you must base your decision on the facts that would be produced
17 here in the courtroom.

18 A Yes, I understand.

19 Q Now, keeping that in mind, can you set aside what
20 little that you may have heard before, or read, and render a
21 fair and impartial verdict in this case; based on the evidence
22 that you would hear right here in this courtroom?

23 A Yes, sir.

24 MR. REMAKLUS: I'll pass the juror for cause.
25

VOIR DIRE EXAMINATION

BY MR. HOWER:

Q. Mr. Woodward, do you subscribe to the Idaho Daily Statesman?

A. Yes, sir.

Q. Did you happen to read the stories in the Statesman about this case --

A. Well --

Q. -- published on Sunday, Monday and Tuesday of this week?

A. Well, I might have missed one or some of them. I've been pretty busy. I think I read some of it, yes.

Q. Okay. As a result of reading those stories, Mr. Woodward, or any stories you read in the Statesman earlier or as a result of any conversations that you've had with people about this case, do you have any impression as of this minute as to whether or not the defendant is connected with serious crimes -- the commission of serious crimes in other states?

A. Well, sometimes you can't believe all you read in the papers. But, I really don't know. I'd have to have -- I'd have to have more on it to decide, yes.

Q. Then, as of this moment you don't have any distinct impression one way or the other on that point; is that correct?

1 A. I believe that's right.

2 Q. Mr. Woodward, have you ever in conversation with
3 anybody about this case, have you ever expressed an opinion to
4 anyone as to whether Mr. Creech is probably guilty or not?

5 A. No, I think every man's entitled to a fair trial.
6 I don't think that is --

7 Q. Mr. Woodward, would you accept it as an ingredient
8 of a fair trial that Mr. Creech should be tried in Idaho for
9 whatever he may be charged in Idaho; that he should be tried
10 in Oregon for whatever he may be charged with in Oregon or
11 Nevada or California or wherever and that he should not be
12 tried in this state for anything that he might have done
13 someplace else?

14 A. I shouldn't think so.

15 Q. Would that seem to be fair to you?

16 A. Yes.

17 Q. Do you feel at this point, Mr. Woodward, that you
18 have any feeling of prejudice, bias, hostility towards
19 Mr. Creech?

20 A. No.

21 Q. You feel you do not?

22 A. I don't have any feelings against anyone like that.
23 I'd have to know more about the case, yes, before I can decide.

24 Q. Are you aware, Mr. Woodward, that there is, in our
25 legal system, a presumption of innocence of crimes? A person

1 is entitled to be presumed innocent until he is proved guilty?

2 A. That's right.

3 Q. If you were to sit on this jury, could you begin
4 your service on that jury with that presumption fully in
5 effect as far as you are concerned?

6 A. Yes.

7 Q. You would start to hear the evidence presuming this
8 defendant innocent?

9 A. Yes.

10 MR. HOWER: Pass for cause, Your Honor.

11

12 FURTHER VOIR DIRE EXAMINATION

13 BY MR. REMAKLUS:

14 Q. We're going to proceed now with other general
15 questioning, Mr. Woodward.

16 I know, of course, that you worked up there at the
17 mill for a long time. Are you still working, or are you
18 retired yet, Mr. Woodward?

19 A. I'm still working.

20 Q. Have you worked all winter? Would you be on shift
21 today if you weren't down here?

22 A. Yes, sir.

23 Q. If you are selected here as a trial juror, you
24 don't have to worry about your job or anything, do you?

25 A. No, sir.

1 Q Fine. If you are selected here, then, you are
2 going to give this defendant a fair -- the benefit of the
3 presumption of innocence and you are going to give him a fair
4 and impartial trial as far as you are concerned; are you not?

5 A Yes.

6 Q Have you ever given any consideration to the death
7 penalty, Mr. Woodward?

8 A I think in some cases it may be necessary, yes.

9 Q Do you understand that it's not the function of the
10 jury to fix punishment; that that's a matter that is taken care
11 of by the law?

12 A Yes.

13 Q Fine. And that isn't our job here, yours or mine.

14 A Um-hmm.

15 MR. REMAKLUS: Pass the juror for cause, Your Honor.

16

17 FURTHER VOIR DIRE EXAMINATION

18 BY MR. HOWER:

19 Q Mr. Woodward, are you professionally acquainted,
20 or socially acquainted, with Mr. Remaklus, the Prosecuting
21 Attorney?

22 A No, sir, I've known him, that's all.

23 Q Are you a religious man, Mr. Woodward?

24 A Yes.

25 Q Do you believe that when one takes an oath that

1 there is a sanction behind that oath beyond what the law might
2 impose?

3 A. Yes.

4 Q. There is a religious sanction behind it; do you
5 believe that?

6 A. Well, I don't quite understand what you mean.

7 Q. Okay. Do you believe if you take an oath and
8 violate it that God will punish you for that?

9 A. Yes, I think so, yes.

10 Q. With that fact in mind, are you ready to state
11 that you can approach the trial of Thomas Creech prepared to
12 base your decision only on the evidence you hear in court and
13 without yielding to any preconceptions or any prejudice that
14 you may feel?

15 A. I think that's fair, yes.

16 Q. And you believe you can do that?

17 A. Yes.

18 MR. HOWER: We accept this juror for cause, Your Honor.

19 THE COURT: We'll ask you, then, Mr. Woodward, to go
20 back to the American Legion Hall and don't discuss with the
21 other jurors what you've been asked here, or the questions.

22 THE WITNESS: Okay.

23 THE CLERK: Patricia Whitaker.

24

25

1 PATRICIA L. WHITAKER,
2 a prospective juror herein, having been first duly sworn, took
3 the stand and testified as follows:
4

5 VOIR DIRE EXAMINATION

6 BY MR. REMAKLUS:

7 Q Mrs. Whitaker, in a jury selection in this matter
8 the questions have been kind of designed in two parts and what
9 we wish to discuss with you first is the matter of pretrial
10 publicity and I'm referring to radio, television and newspaper
11 accounts of this matter and as nearly as possible we're going
12 to confine our questions and our discussion at this time to
13 those things.

14 Have you followed this case in the papers?

15 A Yes, I have.

16 Q And have you followed it on television?

17 A Yes.

18 Q Have you made any particular point of following it
19 in the papers?

20 A Pardon?

21 Q Have you made a particular point of following this
22 in the papers? Have you looked for articles about this?

23 A Yes, because it was here in the County and it was
24 news.

25 Q And is that -- and, of course, it happening here

1 has created some interest in it?

2 A. Yes.

3 Q. Now, I assume that you probably have seen it on
4 television news as well?

5 A. Yes.

6 Q. Now, if you are selected here as a juror, can you
7 put those things aside and base your decision on the evidence
8 you would see produced here in the courtroom?

9 A. I would have to say no.

10 Q. In your present frame of mind, then, could you
11 be fair and impartial as far as this defendant is concerned?

12 A. I would have to say that I do have an opinion, a
13 preformed opinion.

14 Q. And what has caused this, Mrs. Whitaker?

15 A. It's my own personal opinion based on things that
16 I've read and what I think.

17 Q. Now, without asking you what your opinion is, is
18 it fixed at this point?

19 A. Yes.

20 MR. REMAKLUS: We'd ask that Mrs. Whitaker be excused.

21 MR. HOWER: No acception, Your Honor.

22 THE COURT: I'd just like to ask a -- ask you just to
23 clarify the record for my purpose here, I appreciate probably
24 no member of the jury panel wants to sit on this trial or is
25 looking forward to it.

1 With this in mind, there is the possibility that
2 occasionally we have a situation where a juror might say they
3 have a fixed opinion just not to serve and for that reason I
4 would like to have you relate to me, in some detail, what you
5 remember, what stands out in your mind of having read about
6 the case or seen on TV or heard that's causing you to have
7 this fixed opinion.

8 In other words, I'd like, sort of test your
9 memory, to see what you remember having read that's caused you
10 to have an opinion to remember it and part of the things that
11 stand out in your mind.

12 THE WITNESS: The two bodies laying in the ditch and
13 the very fact that every time I go by the area where they are
14 I still remember it.

15 THE COURT: Of course you going by the area, that
16 doesn't have anything to do with what you've read then?

17 THE WITNESS: And for the fact that what is in the
18 papers; there are other bodies involved than just here.

19 THE COURT: I see.

20 THE WITNESS: In Valley County.

21 THE COURT: That fact is affecting you?

22 THE WITNESS: Yes.

23 THE COURT: And an alleged fact?

24 THE WITNESS: Yes.

25 THE COURT: All right, we'll excuse you. We appreciate

1 your frankness, Mrs. Whitaker.

2 We do have another trial scheduled for June 5th
3 at 10:00 so you'll have to remember that date and, unless you
4 are notified in the meantime by the Clerk, that the case has
5 gone off. Thank you.

6 THE CLERK: Sharon Corbin.

7 MR. REMAKLUS: I don't have a qualification form here
8 on her.

9 I really don't have any objection, maybe just a
10 little more leeway on the initial examination is all I have in
11 mind, Your Honor.

12
13 SHARON N. CORBIN,
14 a prospective juror herein, having been first duly sworn, took
15 the stand and testified as follows:

16
17 VOIR DIRE EXAMINATION

18 BY MR. REMAKLUS:

19 Q Mrs. Corbin, the jury selection in this matter is
20 a little different from the usual procedure and the first
21 thing is kind of been divided into two parts. The first thing
22 we wish to discuss with you is the matter of newspaper
23 articles, television broadcasts, conversations and things of
24 that nature or any what we refer to as pretrial publicity.

25 Now, have you followed this matter in the papers?

1 A. I haven't read about it, but I've heard about it.
2 Q. And have you seen anything about it on television?
3 A. Seems like we saw some pictures but, as far as what
4 was said, I do not remember.

5 Q. Nothing about that that's caused you to have any
6 preconceptions, then, is there?

7 A. No.

8 Q. Um-hmm. Have you ever talked to anybody that
9 claimed to know what -- about the facts of the case or anything
10 like that?

11 A. I've heard various things but I don't know how
12 true they would be.

13 Q. These things haven't caused you to have any
14 preconception here in this case, have they?

15 A. No.

16 Q. As far as you are concerned, then, you've got -- you
17 have a free and open mind if you are selected here as a trial
18 juror?

19 A. That's right.

20 Q. Have you ever been a juror before, Mrs. Corbin?

21 A. No, I haven't.

22 Q. If you are selected here the Judge will read the
23 instructions that give you the law of this case and, then, you
24 have to follow those.

25 A. Um-hmm.

1 Q Now, I'm sure that in these instructions the Judge
2 is going to instruct you to base your decision only upon the
3 evidence that you would see and hear right here in the courtroom.
4 You feel that you can follow that instruction?

5 A I would certainly try.

6 Q And if the Judge instructs you that the defendant
7 is presumed to be innocent until proven guilty, you'd follow
8 that instruction as well, I assume?

9 A Yes, I would.

10 MR. REMAKLUS: We'll pass the juror for cause, Your Honor.

11
12 VOIR DIRE EXAMINATION

13 BY MR. HOWER:

14 Q Mrs. Corbin, you mentioned that you have heard a
15 good bit of talk, or some talk, about this case?

16 A Um-hmm.

17 Q Have you heard talk about other possible crimes
18 that Mr. Creech may have been involved with, or may have
19 committed or may have been charged with in other states?

20 A The only thing that I have heard to my understanding
21 is that there are other crimes in other states and that's all
22 I know about.

23 Q You don't know what the crimes are?

24 A I don't know the states or the crimes.

25 Q Do you have any feeling as of this point as to

1 whether Mr. Creech is more likely than not guilty of any other
2 of these offenses in other states?

3 A. I haven't seen anything to where he is completely
4 guilty, no.

5 Q. Have you heard anyone express in an outright opinion
6 as to whether Mr. Creech is probably guilty of the offenses
7 charged here?

8 A. I have heard that they think he's guilty, yes.

9 Q. Have you heard any discussion of the probable
10 reasons why he's guilty --

11 A. No.

12 Q. -- by other people?

13 A. Other than that there was a girl prosecuted for two
14 years or something and that's all I know.

15 But, I don't know if it's the same crime.

16 Q. Yes. You appreciate, Mrs. Corbin, that in our legal
17 system a person accused of crime is entitled to be presumed
18 innocent unless his guilt is proved --

19 A. Yes, I do.

20 Q. -- beyond a reasonable doubt?

21 A. By all means.

22 Q. Do you agree with that?

23 A. Yes.

24 Q. If you were to sit on the jury in this case,
25 Mrs. Corbin, can you start free of any preconceptions or

1 impressions that you may have as a result of the conversations
2 you've heard?

3 A. Yes, I believe so.

4 Q. Do you feel you could be fair, a fair juror, for
5 Mr. Creech?

6 A. Yes, I do.

7 MR. HOWER: Pass for cause, Your Honor.

8
9 FURTHER VOIR DIRE EXAMINATION

10 BY MR. REMAKLUS:

11 Q. Mrs. Corbin, do you have small children at home?

12 A. I have three teenagers.

13 Q. And if you are selected here and if it takes a
14 few days, can you make arrangements for the children to be
15 properly looked after?

16 A. Yes, I can.

17 Q. And have you ever been a juror before?

18 A. Never.

19 Q. I guess maybe I asked you that, I don't remember.
20 Of course, the Judge will instruct you and you are
21 bound to follow those instructions, you must do so.

22 Have you ever given the death penalty any consideration,
23 Mrs. Corbin?

24 A. I believe in it. It depends on the circumstances.

25 Q. In other words, you'd have to be convinced that

1 beyond a reasonable doubt; is that correct?

2 A. Right, um-hmm.

3 Q. Fine. And if the State meets that obligation, then,
4 you could render your verdict based on the evidence?

5 A. Right.

6 Q. Do you understand, Mrs. Corbin, that it is not the
7 function of the jury to set the penalty in a criminal case?

8 A. I understand that.

9 Q. The Judge -- the law fixes the penalty and the
10 Judge pronounces judgment and your duty as a juror will be to
11 determine the facts; that is, guilty or not guilty.

12 A. Right.

13 MR. REMAKLUS: I'll pass the juror for cause, Your Honor.

14

15 FURTHER VOIR DIRE EXAMINATION

16 BY MR. HOWER:

17 Q. Mrs. Corbin, I don't want to offend you and I don't
18 want to pry unnecessarily, but you will appreciate that we have
19 to be careful --

20 A. Right.

21 Q. -- about these things.

22 You are aware that you are now under oath?

23 A. Yes, I do.

24 Q. I want to ask you, Mrs. Corbin, what the oath means
25 to you.

1 A. Means that you should say the truth in all ways.

2 Q. Do you think of yourself as a religious person?

3 A. No, I don't.

4 Q. You do not?

5 A. No.

6 Q. The sanction of the oath, then, is a civil sanction
7 or your conscience but not possible punishment if you should
8 violate it?

9 A. I think you should take what you hear into all
10 considerations but you pass judgment.

11 Q. Yes. I want to ask you, Mrs. Corbin, if you feel
12 easy in your conscience --

13 A. Yes, I do.

14 Q. -- in accepting the possibility of sitting on this
15 jury?

16 A. Yes, I would.

17 Q. You are not willing to sit on the jury because you've
18 made up your mind what should be done with Mr. Creech and you
19 want to have a part in doing it?

20 A. No.

21 Q. You are giving him a fair break in your deepest
22 thought at this moment?

23 A. I believe I would, yes.

24 MR. HOWER: We accept Mrs. Corbin for cause, Your Honor.

25 THE COURT: We'll ask you to go back and remain in the

1 American Legion Hall, Mrs. Corbin. I'll ask you not to discuss
2 the questioning that took place here with the other jurors.

3 THE WITNESS: Okay. Thank you.

4 THE CLERK: William J. Godfrey.

5

6 WILLIAM J. GODFREY,
7 a prospective juror herein, having been first duly sworn, took
8 the stand and testified as follows:

9

10 VOIR DIRE EXAMINATION

11 BY MR. REMAKLUS:

12 Q Mr. Godfrey, in the jury selection in this case it's
13 been kind of divided into two portions and the first thing we
14 wish to discuss with you pretrial publicity and I'm referring to
15 newspaper articles, television, radio broadcasts, conversations
16 that you have, or may have, engaged in, or conversations you
17 may have overheard.

18 As closely as possible we're going to confine our
19 questions to you at this time to those things.

20 Now, have you followed this in the papers?

21 A. Yes, I have.

22 Q And have you checked -- have you seen the TV
23 broadcasts?

24 A. No, I haven't got any TV.

25 Q Have you made any particular point in following this

1 in the papers?

2 A. Everything I can find.

3 Q. And how recently have you -- strike that.

4 In -- have you had conversations about this?

5 A. Well, yes, people talk about it.

6 Q. If you are selected as a juror on this matter, you
7 are going to sit here and try the case. Could you put these
8 things that you may have read or heard to the back of your mind
9 and give Mr. -- or the defendant here in this case, could you
10 give him a fair and impartial trial?

11 A. Well, I don't know. Be pretty hard.

12 Q. I see you've been a juror before but it's quite
13 awhile ago.

14 Now, if you are selected here, Mr. Godfrey, the
15 Judge, as part of his duty, is going to read you the instructions
16 which contains the law as far as this case is concerned and,
17 as a juror, you would have to follow the law as he gives it to
18 you.

19 Now, I'm sure you would be willing to follow those
20 instructions; would you not?

21 A. Oh, yes.

22 Q. Now, if the Judge were to instruct you that you had
23 to base your decision solely on the evidence that is produced
24 here in this courtroom; that you could also follow that
25 instruction, couldn't you?

1 A Yes.

2 MR. REMAKLUS: We'll pass the juror for cause, Your Honor.

3

4 VOIR DIRE EXAMINATION

5 BY MR. HOWER:

6 Q Mr. Godfrey, you mentioned that you have read all
7 you can find about this case in the newspaper.

8 A I couldn't understand you.

9 Q You mentioned that you have read all you could find
10 about this case in the newspaper?

11 A Yes.

12 Q And you mentioned that you had talked about it;
13 that there was talk about it.

14 Have you been involved in a great deal of
15 conversation about the case?

16 A Pardon?

17 Q Have you been involved in a great deal of
18 conversation, of talk?

19 A Oh, not too much, no.

20 Q Pardon?

21 A Not too much, no.

22 Q Not too much? In the course of those conversations,
23 Mr. Godfrey, have you ever expressed an opinion to anyone as to
24 whether Mr. Creech was probably guilty or not?

25 A Yes, I expect I have.

291 GODFREY, WILLIAM. VOIR DIRE.

1 Q Do you have such an opinion at this time?
2 A How?
3 Q Do you have such an opinion at this time?
4 A Well, from what I read and everthing I have, yes.
5 Q Do you have any opinion, Mr. Godfrey, as to whether
6 Mr. Creech is probably guilty of crimes of some kind in other
7 states besides Idaho?
8 A I don't understand you yet.
9 Q Do you have an opinion as to whether Mr. Creech is
10 probably guilty of crimes in other states?
11 A Yes.
12 Q Would that influence your opinion as to whether
13 he's probably guilty of a crime here?
14 A Well, probably would, yes.
15 Q Now, when asked, Mr. Godfrey, you said you thought
16 you could follow an instruction from the Judge that you were to
17 decide this case only on the basis of the evidence. Do you
18 really think you could do that?
19 A Whatever the Judge said, that would be the law;
20 wouldn't it? That is what you have to follow.
21 Q That would be the law, Mr. Godfrey, but we're all
22 human and everybody recognizes that.
23 Let me put it this way: In our system of law,
24 Mr. Godfrey, Mr. Creech is entitled to be presumed innocent
25 until he's proved guilty. As of this minute do you presume

1 Mr. Creech to be innocent?

2 A. Well, I wouldn't hardly know. As you said, you
3 aren't supposed to read in the paper, but everything ties right
4 together.

5 Q. Does that mean, Mr. Godfrey, that you do not, at
6 this point, presume Mr. Creech to be innocent?

7 A. Well, yes, it does.

8 Q. All right. Now, if the Judge should say to you, if
9 you are about to be sworn on the jury and the Judge should say
10 to you, "Beginning now you presume Mr. Creech to be innocent."
11 In your deepest thoughts, could you do that?

12 A. I didn't understand your question.

13 Q. Could you do that?

14 A. I didn't understand your question.

15 Q. Okay. You have said that you do not now presume
16 Mr. Creech to be innocent. If the Judge told you you must
17 presume him innocent, would you then presume him innocent?

18 A. Well, I would imagine so. Of course, I said I
19 would do what the Judge said according to his instructions.

20 MR. HOWER: I challenge the juror.

21 THE WITNESS: If -- it might be against my belief, but
22 if his instructions was that --

23 MR. HOWER: I challenge the juror for cause.

24 THE COURT: Take an exception?

25 MR. REMAKLUS: Well, I do, because Mr. Godfrey here is

1 giving some honest and straightforward answers and I'm not
2 satisfied that some of the questions propounded by Counsel were
3 exactly clear, Your Honor.

4 THE COURT: Do you want to ask further questions?

5 MR. REMAKLUS: Yes.

6

7 FURTHER VOIR DIRE EXAMINATION

8 BY MR. REMAKLUS:

9 Q To get back to the presumption of innocence if this
10 -- if the Judge tells you that as a matter of law this man is
11 presumed to be innocent until proven guilty beyond a reasonable
12 doubt, you are going to follow that instruction; are you not,
13 Mr. Godfrey?

14 A Yes.

15 MR. REMAKLUS: I'm going to resist the challenge,
16 Your Honor.

17 THE COURT: Let me ask you a couple of questions,
18 Mr. Godfrey. I appreciate your willingness to follow the
19 Court's instructions and I'm sure you feel that way; that you
20 should do that and would certainly try.

21 I guess what we're really talking about is, knowing
22 human frailties and human capacities, whether it would really
23 be possible for you to do that; even though you wanted to and
24 would try.

25 Now, you've indicated you have some rather fixed

1 ideas about this from what you read, is that right?

2 THE WITNESS: Yes.

3 THE COURT: Can you tell me what those impressions, ideas
4 or opinions are based on in a little more detail?

5 What is it that you read about the case that's
6 caused you to have the opinion? What stands out in your mind
7 of some of these things you've read?

8 THE WITNESS: Well, I wouldn't really know. But, then,
9 I read everything I could find about the plane wreck down in
10 California and everything about what the papers all said about
11 it.

12 THE COURT: Okay. What do you remember they said about
13 the plane wreck? Why were they down there and do you remember
14 what it said about that?

15 THE WITNESS: About what?

16 THE COURT: Why were they down there?

17 THE WITNESS: Looking for some dead bodies.

18 THE COURT: What?

19 THE WITNESS: Looking for some dead bodies.

20 THE COURT: I see. Have you read things about that in
21 other articles?

22 THE WITNESS: No, just in the paper.

23 THE COURT: You mean in the paper, have you read other
24 articles about other bodies?

25 THE WITNESS: Oh, yeah.

1 THE COURT: Is that one of the facts that stands out in
2 your mind here?

3 THE WITNESS: Yes, it is.

4 THE COURT: Mr. Godfrey, you've indicated you would try
5 to follow my instructions; that the defendant is presumed
6 innocent at the start of the trial.

7 Let me ask you this: Do you feel, though,
8 searching your mind, that it would require some evidence on his
9 part to remove these opinions you have? Would he have to prove
10 -- give you some proof that showed he wasn't guilty?

11 THE WITNESS: Yes, he would.

12 THE COURT: Well, I'm going to grant the challenge. We
13 appreciate your frankness, Mr. Godfrey, that's what we wanted
14 you to tell us; what you felt and I don't want you to feel you
15 are shirking your duties by it.

16 You are excused, we appreciate your being honest
17 with us and telling us how you felt about it. But, I feel we'll
18 excuse you.

19 We have another trial scheduled on June 5th at
20 10:00 if you will remember that date.

21 THE WITNESS: June 5th?

22 THE COURT: Yes, at 10:00, if you will come back here
23 then. You can go now. Thank you.

24 THE CLERK: Harold Bolt.

25

1 HAROLD M. BOLT,
2 a prospective juror herein, having been first duly sworn, took
3 the stand and testified as follows:
4

5 VOIR DIRE EXAMINATION
6 BY MR. REMAKLUS:

7 Q Mr. Bolt, jury selection in this case has been
8 sort of divided into two parts and the first part of it is
9 going to be concerned with pretrial publicity, newspaper
10 articles, radio and television and things of that nature.

11 Have you had any particular occasion to follow this
12 thing in the newspapers?

13 A Well, I've read articles, I guess, you know, since
14 the incident.

15 Q Since it happened here?

16 A Yes.

17 Q Um-hmm. I'm assuming you've seen TV broadcasts,
18 have you?

19 A Yes, I have.

20 Q And have there been any conversations around work
21 concerning this case that you consider to have any significance
22 at all?

23 A No, I don't believe so.

24 Q Mr. Bolt, if you are selected here as a trial juror
25 in this case, could you put what you may have read or heard

1 about it aside and render a fair and impartial verdict based
2 solely and only on the evidence that you would see and hear right
3 here in the courtroom?

4 A. Well, I believe in the judicial system and I think
5 I would -- could be fair and objective and assume innocence
6 until guilt was proven.

7 Q. Yes. And I see you haven't been a juror before,
8 Mr. Bolt?

9 A. Yes, I was a juror last week.

10 Q. Oh, fine. Well, then, it is fresh in your mind
11 about receiving the instructions from the Court?

12 A. Yes.

13 Q. And you are bound to follow those as to the law?

14 A. Yes, sir.

15 Q. And I know you remember that it's the duty of the
16 State to prove the guilt beyond a reasonable doubt.

17 A. Yes, sir.

18 Q. And it --

19 MR. REMAKLUS: I think we'll pass the juror for cause,
20 Your Honor.

21 MR. HOWER: Pass for cause, Your Honor.

22 THE COURT: Mr. Bolt, just let me ask you one question.
23 You did indicate you have read some newspaper articles and
24 watched some TV broadcasts involved in this case?

25 THE WITNESS: Yes, I have.

1 THE COURT: Are there any particular facts that stand
2 out in your memory that you read in these articles or heard on
3 the TV at this point as you sit here today?

4 THE WITNESS: I don't believe any one particular thing
5 would be standing out in my mind, no, sir.

6 THE COURT: Can you tell me some of the things you do
7 remember reading?

8 THE WITNESS: Well, I remember I read about the airplane
9 incident just most recently and other than this, I think it's
10 been long enough ago that no particular incidents would stand
11 out in my mind.

12 THE COURT: Have you read any of the articles within the
13 last five days here, Sunday's --

14 THE WITNESS: I haven't read anything since I was on the
15 jury last week, I don't believe.

16 THE COURT: You haven't read anything?

17 THE WITNESS: No.

18 THE COURT: All right, proceed.

19
20 FURTHER VOIR DIRE EXAMINATION

21 BY MR. REMAKLUS:

22 Q Mr. Bolt, the next portion of questioning would be
23 rather to general qualifications.

24 A Yes.

25 Q And does the attorney-client relationship exist

1 between you and Mr. Hower?

2 A. No.

3 Q. And proper arrangements can be made as far as your
4 employment is concerned, if you are selected here as a trial
5 juror, is that right?

6 A. Yes.

7 Q. If the jury is sequestered and you have to stay
8 away from them, then, Mrs. Bolt will be home to look after the
9 kids?

10 A. Yes, I've made any necessary arrangements just in
11 case.

12 Q. All right. Have you ever given any consideration,
13 Mr. Bolt, to the death penalty?

14 A. Yes, I've thought about it.

15 Q. Do you feel that there's anything in your thoughts
16 that would interfere with you rendering a verdict in this case;
17 based on the law and the evidence, the evidence to be produced
18 in the courtroom and instructions given to you by the Judge?

19 A. I don't think I understand, Mr. Remaklus.

20 I don't know what the Idaho law is and --

21 Q. Fine. I don't think it was a fair question,
22 Mr. Bolt, so I'll try to rephrase it.

23 A. All right.

24 Q. As a juror I'm sure you understand that it is not
25 your function to pronounce judgment. You'll find guilt or

300 BOLT, HAROLD. VOIR DIRE.

1 innocence.

2 A. Yes, all right, yes.

3 Q. Yes. And, as far as what penalties are, that's
4 fixed by the legislature.

5 A. Yes.

6 Q. And you, as a juror, have no control there, you
7 understand that?

8 A. Yes, I understand that.

9 Q. And you know that any penalty that's handed out in
10 this case is going to be pronounced by the Judge and that that
11 is not a function of you as a juror.

12 A. I understand, yes.

13 Q. And I'm sure you are familiar with the presumption
14 of innocence?

15 A. Yes.

16 Q. You are willing to give the defendant that benefit?

17 A. Yes, I am.

18 MR. REMAKLUS: We'll pass the juror for cause, Your Honor.

19

20 FURTHER VOIR DIRE EXAMINATION

21 BY MR. HOWER:

22 Q. Mr. Bolt, are you socially acquainted with
23 Mr. Remaklus?

24 A. No, I don't think we've ever socialized. I've
25 known Mr. Remaklus for a number of years because I used to live

1 in Cascade.

2 Q You lived in Cascade as a Forest Ranger, is that
3 right?

4 A Yes.

5 Q What years did you live here?

6 A '62 to '69.

7 Q Mr. Bolt, you and -- you are socially acquainted --

8 A Yes, I would say we are --

9 Q -- acquainted?

10 A We are acquainted. I don't think we're intimate.

11 Q Is there anything in that relationship which would
12 impair your judgment according to your oath on a murder case?

13 A I don't think so. I thought about this on the way
14 down this morning and I think I put you two on a par as how well
15 I know both of you.

16 Q Even if you didn't, you would not decide the case
17 on whether you like me or Mr. Remaklus or whether you know us
18 or anything like that?

19 A No.

20 Q Sometimes we negative or omit in questioning to
21 touch upon something that is of concern to you. I want to ask
22 if there's any reason whether or not it's -- Mr. Remaklus or I
23 have touched upon it, is there any reason why it would be a
24 hardship or painful or difficult or a problem in your conscience
25 for you to serve as a juror in this cause?

1 A. I don't believe so. I think I have a right frame of
2 mind as far as the judicial system is concerned.

3 MR. HOWER: Pass this juror for cause, Your Honor.

4 THE COURT: We'll ask you to go back over to the American
5 Legion Hall, Mr. Bolt, and remain there and you are not to
6 discuss the questioning here with the other jurors.

7 THE WITNESS: Yes.

8 THE CLERK: Alice Ange.

9
10 ALICE I. ANGE,
11 a prospective juror herein, having been first duly sworn, took
12 the stand and testified as follows:

13
14 VOIR DIRE EXAMINATION

15 BY MR. REMAKLUS:

16 Q. Mrs. Ange, jury selection in this matter has been
17 divided into two portions and the first thing that we wanted to
18 discuss with you is the pretrial publicity; consisting of
19 newspaper articles, radio and television broadcasts and things
20 of that nature.

21 May I inquire as to whether or not you have had
22 occasion to follow this in the newspapers?

23 A. I did when it first came out, yes.

24 Q. And of late, have you seen anything about it in the
25 papers?

1 A. Just what was in Sunday's paper.

2 Q. And have you folks watched television in the
3 evening?

4 A. Some.

5 Q. Have you seen it on the news occasionally?

6 A. Yes.

7 Q. Mrs. Ange, have you had occasion to discuss this
8 at all at work or at home?

9 A. Not much, no.

10 Q. Do you feel that anything that you may have read
11 or heard or talked about would tend to influence you one way or
12 the other if you are selected as a juror in this case?

13 A. I don't think so.

14 Q. I don't think you've been a juror before, have you?

15 A. No, I have not.

16 Q. If you are selected as a trial juror, Mrs. Ange,
17 the Judge will give you the instructions as to what the law is
18 and that you will have to follow his instructions.

19 Now, I'm sure that you will want to follow the
20 instructions; is that correct?

21 A. Um-hmm.

22 Q. Now, in the event you might have a different opinion
23 as to what the law is, or should be, you would still have to
24 follow what His Honor instructs you and this would present no
25 difficulty; would it?

1 A. No.

2 Q. Now, so far as you are concerned at this point, you
3 feel that you could render a fair and impartial verdict in this
4 case based solely on the evidence that you would get here in
5 the courtroom?

6 A. I'm sure I could.

7 MR. REMAKLUS: I'll pass the juror for cause, Your Honor.

8

9 VOIR DIRE EXAMINATION

10 BY MR. HOWER:

11 Q. Mrs. Ange, in your business you have occasion to
12 meet the public; is that correct?

13 A. Yes.

14 Q. And you, yourself, work there so that when people
15 come in and out you chat with them?

16 A. Yes.

17 Q. In that connection at your business, or at your
18 home or in your social life or any place else, have you heard
19 very much conversation about this case?

20 A. Oh, some, not --

21 Q. When the case has come up as the subject of
22 conversation, have you participated, or just listened or what?

23 A. I don't say too much because I don't --

24 Q. You what?

25 A. I say, I don't say too much because I just don't

1 know the facts.

2 Q Have you listened?

3 A More or less.

4 Q Have you heard any conversation in which people
5 talked as if they knew what had happened?

6 A Well, I've heard remarks both ways.

7 Q Both ways? What do you mean by that?

8 A Some have more understanding than other people, and
9 as you should know.

10 Q Mrs. Ange, have you heard anyone express an opinion
11 in any way sympathetic to Mr. Creech?

12 A Not to him, no.

13 Q Have you heard anyone express an opinion indicating
14 that they believed that Mr. Creech to be guilty?

15 A Several.

16 Q Isn't it true, Mrs. Ange, that every opinion you've
17 heard has been to that effect?

18 A But, I don't voice my own opinions because I feel,
19 being a Christian, I don't have a right to.

20 Q You don't have a right?

21 A No.

22 Q You have, then, expressed your own opinion in the
23 course of these conversations?

24 A Like I say, the circumstances, I don't really know
25 enough to really say one way or another.

1 Q Has it been your opinion, Mrs. Ange, that you ought
2 not to have an opinion until you know what the facts are?

3 A Yes.

4 Q Is that still your opinion?

5 A (No audible response.)

6 Q Mrs. Ange, have you heard talk or conversation
7 about the possibility that Mr. Creech is connected with crimes
8 in some other state?

9 A No, I have not.

10 Q I did not --

11 A No.

12 Q You haven't heard anything about that at all?

13 A No.

14 Q We've talked to so many prospective jurors I might
15 have missed an answer to this question. Did you say you had not
16 read newspaper stories about the case?

17 A Yes, I have read some when they first came out.

18 Q Do you recall in any of the newspaper stories that
19 you read, was there any reference to Mr. Creech's possible
20 connection with other crimes in other states?

21 A Just what I've read.

22 Q Yes, I'm asking you what it was you read. Did you?

23 A Just that he had been taken to different states on
24 different --

25 Q Did you understand for what purpose he was taken to

1 other states?

2 A. As I understand, for murder. I don't know, other
3 than that.

4 Q. Well, Mrs. Ange, we assume that you would try your
5 best to put these thoughts out of your mind, put this
6 information out of your mind if you were a juror in this case.

7 But, it's natural for us to be concerned as to
8 whether you would be able to do this; even though we assume you
9 would try your best.

10 A. Um-hmm.

11 Q. What's your feeling about that?

12 A. Well, I don't really know. Like I say, from a
13 Christian standpoint, I can't judge. All I can go is by facts.

14 Q. Do you have any impression or feeling or
15 inclination at this moment that Mr. Creech is probably guilty
16 or probably not guilty of the offenses he's charged with?

17 A. No, I don't.

18 MR. HOWER: Pass for cause, Your Honor.

19

20 FURTHER VOIR DIRE EXAMINATION

21 BY MR. REMAKLUS:

22 Q. Mrs. Ange, we'll have some additional questions for
23 you and if you are selected as a juror, have you, or can you
24 make arrangements as far as your work is concerned to be away?

25 A. Yes.

1 Q And you don't have any children at home, I see?

2 A No.

3 Q Mrs. Ange, have you considered the death penalty?

4 A I have, but that's one position I hope I never get
5 put in.

6 Q If you are a juror, do you have a moral or religious
7 opinion or attitude concerning the death penalty?

8 A No.

9 Q If -- would your feelings regarding the death
10 penalty interfere with your judgment, or your ability to
11 return a verdict in this case if you thought the defendant was
12 guilty and, then, you had to consider the death penalty?

13 A I don't think so.

14 Q You believe that you could if the Judge instructs
15 you that the penalty is not a matter for your consideration.
16 Could you separate the idea of penalty from the finding of
17 guilt or innocence?

18 A Yes.

19 Q Of course, as a juror your duty would be to determine
20 the facts and, in this case, will be the fact of guilty or
21 not guilty.

22 A Um-hmm.

23 MR. REMAKLUS: I think we'll pass the juror for cause,
24 Your Honor.

25 MR. HOWER: I have a few more questions, Mrs. Ange.

1 FURTHER VOIR DIRE EXAMINATION

2 BY MR. HOWER:

3 Q I want to say, Mrs. Ange, that I don't want to
4 offend you and I don't want to press any more than necessary
5 into private areas, but there are some things we have a right
6 to inquire about.

7 A Um-hmm.

8 Q And, in this kind of a case, we must be careful.
9 Do you consider yourself, Mrs. Ange, a religious
10 woman?

11 A No.

12 Q You do not?

13 A No.

14 Q How do you feel -- what is your feeling about the
15 sanction; that is the authority behind an oath that you take?
16 Do you feel you are at liberty to disobey an oath if you chose
17 to?

18 A No, I do not.

19 Q What is your feeling about it?

20 A Well, I think you have to obey any ruling in the
21 courtroom and I don't think it interferes.

22 Q I'm not talking so much about legal sanctions
23 whereby the law says you must obey it for the reason that
24 things that are between you and your conscience and can never
25 be proved.

310 ANGE, ALICE. VOIR DIRE.

1 A. Um-hmm.

2 Q But I'm talking rather about whether you feel bound
3 by something that when you take an oath you must do what you
4 have sworn to do. Do you feel so bound for any reason?

5 A No, I don't.

6 Q Are you saying, then, Mrs. Ange, that when you take
7 the oath, which you will be asked to take as a juror in this
8 cause --

9 A Um-hmm.

10 Q --- that thereafter you may do something contrary
11 to that oath if you choose?

12 A (No audible response.)

13 Q You shook your head. I don't understand what
14 answer you are intending to say.

15 A You are meaning that I -- I'm not getting quite what
16 you are saying.

17 Q I know this is difficult and I'm sorry I even have
18 to ask. But, I feel I must.

19 If you're chosen as a juror in this cause, you will
20 be asked to be sworn --

21 A Um-hmm.

22 Q -- that you will try the cause well and truly and
23 that you will --

24 A Yes.

25 Q -- go by the evidence and by the instructions from

1 the Judge.

2 I'm inquiring as to how you will feel if, after you
3 take that oath the question should arise in your conscience as
4 to whether that's what you are going to do or not. I want to
5 put it to you, Mrs. Ange, in kind of a context that often
6 arises for jurors. There may come a time when you feel that
7 evidence which might have been presented for or against the
8 defendant was not presented. You may feel that you know
9 perfectly well something is true or that something is not true,
10 not based on what you hear in this courtroom --

11 A. Um-hmm.

12 Q. -- but based on something else.

13 Now, if that should happen and, even though it
14 would be a violation of your oath, would you feel that it was
15 possible for you to go by what you know to be true rather than
16 what you heard in this courtroom; this is where it comes down
17 to the nub.

18 A. I really don't know how to answer you.

19 Q. Pardon?

20 A. I said, I really don't know how to answer you.

21 Q. All right. I'll put the question to you just as I
22 have for a specific answer.

23 Suppose you felt normally, absolutely certain that
24 something was true but it had not been proved in this courtroom.
25 Would you then base your verdict in this case in any degree at

1 all on what you knew to be true but what had not been received
2 as evidence in this courtroom?

3 A. No, I don't think so.

4 Q. You don't think you would?

5 A. (No audible response.)

6 Q. I'm asking these questions, Mrs. Ange, because of
7 what is almost certainly a reality --

8 A. Um-hmm.

9 Q. -- in this case and that's that you have heard --
10 we know you have heard, you've said you have heard talk about
11 it. Many people have opinions about it, many people have
12 expressed opinions about it and that all this has had some
13 effect upon you.

14 A. Um-hmm.

15 Q. Are you able to say with a clear conscience that
16 in spite of that, knowing that's impressed at present in your
17 mind, will it have to be displaced by evidence presented for
18 the defendant or by anything else in order for you to approach
19 the decision of this case solely on the evidence you hear in
20 court. Can you do that?

21 A. You mean go just by what you hear in the courtroom
22 and not what I read?

23 Q. That's what I meant, not what you've read or heard.

24 A. Yes.

25 Q. Are you confident you can do that?

1 A. Um-hmm.

2 MR. HOWER: Pass for cause, Your Honor.

3 THE COURT: We'll take our noon recess until 1:15.

4 Mrs. Ange, you can go to lunch now but, when you
5 come back would you go back into the American Legion Hall,
6 please, and remain there.

7 I'll ask you not to discuss the questioning here
8 that has gone on with any of the other jurors if you do that,
9 please.

10 THE WITNESS: Okay.

11 (Noon recess taken.)
12
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22
23
24
25

1 CASCADE, IDAHO, WEDNESDAY, MAY 21, 1975, 1:18 P.M.

2
3
4 THE COURT: Defendant's fourth.

5 THE CLERK: Wesley R. Knee.

6
7 WESLEY R. KNEE,
8 a prospective juror herein, having been first duly sworn, took
9 the stand and testified as follows:
10

11 VOIR DIRE EXAMINATION

12 BY MR. REMAKLUS:

13 Q Mr. Knee, we first wish to discuss with you any
14 pretrial publicity which you may have been exposed to; including
15 newspaper articles, radio and television broadcasts,
16 conversations that you have engaged in or overheard.

17 We're going to -- at this point we're going to
18 confine our questions pretty much to that.

19 Now, have you had occasion to follow this case in
20 the papers?

21 A I read some articles on it, yeah.

22 Q Have you read any recent articles, Mr. Knee?

23 A I believe it was a little article in there Monday
24 I read, yeah.

25 Q How about -- have you caught it on the news on

1 television?

2 A. I don't remember of.

3 Q. Have you made any particular point of following this
4 case?

5 A. Not really, no.

6 Q. Have you had any conversations around on the job
7 about it?

8 A. Probably.

9 Q. Nothing that anyone who purported to know the facts
10 of it, was there, Mr. Knee?

11 A. No.

12 Q. I notice here on this juror questionnaire now that
13 you sent in that you've never been a juror before.

14 A. That's right.

15 Q. Now, if you are accepted here you will be instructed
16 as to the law by the Judge and, of course, you'll have to
17 follow it. I'm sure one of the instructions will be that you'll
18 have to base your decision on the case on the evidence you see
19 and hear right here in the courtroom.

20 Now, do you think you could render a fair and
21 impartial verdict in this case based on the Judge's instructions
22 there?

23 A. I don't see why not.

24 MR. REMAKLUS: I'll pass the juror for cause, Your Honor.
25

VOIR DIRE EXAMINATION

BY MR. HOWER:

Q Mr. Knee, do you now have any impression as to whether the defendant is guilty or not?

A No, I don't know enough about it to make the decision about it.

Q Do you recall reading about a trip the defendant took to California a few weeks ago?

A Yes.

Q Do you know what that trip was for?

A Something about finding some bodies or something; wasn't it?

Q Do you know how it turned out?

A No -- well, it did say didn't find nothing, yeah.

Q Is that all you remember about that?

A Yeah, the plane went down coming back.

Q Yes. Is there anything about that, Mr. Knee, that makes you think the defendant is more or less likely to be guilty than if you hadn't read that?

A I don't know. That's all I know about it. I really couldn't say.

Q Does that give you any impression as to whether or not the defendant is guilty?

A No, not really. I don't know enough about it.

Q Have you heard a great deal of talk among your

1 friends or workers at the mill?

2 Have you heard a great deal of talk about this
3 case?

4 A. Hasn't been much said about it, no.

5 MR. HOWER: Okay. We pass this juror for cause,
6 Your Honor.

7
8 FURTHER VOIR DIRE EXAMINATION

9 BY MR. REMAKLUS:

10 Q. Mr. Knee, of course I know where you work and I
11 know you've been there a long time now. Would you be on shift
12 today if you weren't down here?

13 A. Tonight.

14 Q. Um-hmm. Now, if you are selected here as a juror,
15 proper arrangements can be made so you don't have to worry
16 about your job?

17 A. No.

18 Q. You won't have any qualms about that?

19 A. No.

20 Q. Does the attorney-client relationship exist between
21 you and Mr. Hower? Is Mr. Hower doing any legal work for you?
22 Or do you just know him as the attorney here that was just
23 asking you the questions?

24 A. I don't remember knowing him, no.

25 Q. Fine. No attorney-client relationship?

1 A. No.

2 Q Have you ever given any consideration, Mr. Knee, to

3 the death penalty?

4 A. Not too much, no.

5 Q Do you have any moral or religious opinion with

6 reference to the death penalty?

7 A. No.

8 Q There's nothing in connection with the death

9 penalty, then, that would interfere with your judgment as to

10 guilt or innocence in this case? You could decide -- what I'm

11 asking you is this: Could you base your decision and arrive at

12 your verdict based on the evidence --

13 A. Yes, sir.

14 Q -- that's being presented right here?

15 A. Yes, sir.

16 Q And you understand that the penalty, whatever the

17 law says, that's what it is and that isn't for you to question

18 as a juror, or for me to question as a Prosecutor?

19 A. Yes, sir.

20 Q And if you are selected that your solemn duty will

21 be to determine guilty or not guilty?

22 A. Yes, sir.

23 MR. REMAKLUS: I'll pass the juror for cause, Your Honor.

24

25

FURTHER VOIR DIRE EXAMINATION

BY MR. HOWER:

Q Mr. Knee, we have a little form on you and it says that you have a child 34. Is that a boy or girl; man or woman?

A It's a stepdaughter.

Q Stepdaughter?

A Yeah.

Q Does she have children?

A Got two boys.

Q How old are they?

A One is 16, I think, and one is 12.

Q Where do they live?

A Just out of McCall.

Q Just out of McCall?

A Yeah, about three and a half miles.

Q Um-hmm. Mr. Knee, I guess I'll return the compliment, has Mr. Remaklus ever been your lawyer?

A No.

Q There's no attorney-client relationship between you?

A No.

Q Are you well acquainted with him socially?

A Mr. Remaklus?

Q Um-hmm.

A No, I know him though.

1 Q You know him and you know who he is? But you are
2 not close friends, you are not intimate friends?
3 A No.
4 Q There's nothing about your relationship with
5 Mr. Remaklus that would interfere with your decision in this
6 case?
7 A No, sir.
8 Q How long have you worked at the McCall mill?
9 A About 16 years.
10 Q Sixteen years?
11 A Um-hmm.
12 Q Have you ever held office in the union?
13 A On who?
14 Q Have you ever held office in the union?
15 A Office?
16 Q Yes.
17 A No -- well, I guess I'm trustee now.
18 Q You are trustee now? This is the only union office
19 you've ever held?
20 A Right.
21 Q Mr. Knee, sometimes there are things that we should
22 know about and we don't know enough to ask. Is there anything
23 that we haven't asked about that's on your mind that bears on
24 the question of whether you are well qualified to be a juror in
25 this case?

1 A. No, sir.

2 Q. You feel that you are well qualified?

3 A. Well, I really couldn't say. I don't know.

4 Q. You have no problems with your conscience, no
5 reservations about whether you can sit as a juror?

6 A. No.

7 MR. HOWER: Okay. Pass for cause, Your Honor.

8 THE COURT: Mr. Knee, we'll ask you to wait back in the
9 Hall, the American Legion Hall, and I'll ask you not to discuss
10 the questioning here with the other jurors, the questions that
11 were asked.

12 THE WITNESS: Yes, sir.

13 THE COURT: You may leave.

14 MR. REMAKLUS: May I have just a moment, Your Honor.

15 THE COURT: Yes.

16 THE CLERK: Janice Lynn Wilde.

17

18 JANICE LYNN WILDE,

19 a prospective juror herein, having been first duly sworn, took
20 the stand and testified as follows:

21

22 VOIR DIRE EXAMINATION

23 BY MR. REMAKLUS:

24 Q. Mrs. Wilde, jury selection in this case is
25 divided into two parts, the first part we wish to discuss with

1 you concerns pretrial publicity consisting of newspaper
2 articles, television, radio broadcasts, conversations you may
3 have heard and as nearly as possible we're going to try to
4 limit our questions at this time, you know, to those things.

5 A. Um-hmm.

6 Q. Have you followed this case in the paper?

7 A. Yes, I have.

8 Q. And have you followed it, or have you seen
9 television broadcasts of it?

10 A. Yes, I have.

11 Q. And you are strictly a housewife now; aren't you?

12 A. Yes, I am.

13 Q. Have you had any conversations with anyone
14 regarding this case; including your husband?

15 A. Well, you mean recently?

16 Q. Well -- yes, um-hmm, recently.

17 A. No, I haven't.

18 Q. And have you ever expressed an opinion yourself
19 as to guilt or innocence or anything like that?

20 A. No, I haven't.

21 Q. You've never been on a jury before, have you?

22 A. No, sir.

23 Q. Now, if you are selected the Judge will give you
24 -- he will read you instructions which set forth the law that
25 pertains to this case and I'm sure one of the instructions will

1 be that you'd have to make up your mind as to guilt or
2 innocence based on the evidence that you would see and hear
3 right here in the courtroom.

4 Now, this being the case, do you feel that you could
5 exclude from your mind information you may have picked up from
6 other sources and be completely fair and impartial as to --

7 A. Yes, I could.

8 Q. You haven't got any preconceived ideas about this
9 case because of something you may have read, is that right?

10 A. That's right.

11 Q. I don't remember whether I've asked you, but have
12 you seen enough on television about it to make any impression,
13 Mrs. Wilde?

14 A. No, I haven't.

15 MR. REMAKLUS: We'd pass the juror for cause,
16 Your Honor.

17 MR. HOWER: We'll pass Mrs. Wilde for cause.

18
19 FURTHER VOIR DIRE EXAMINATION

20 BY MR. REMAKLUS:

21 Q. We have some more questions to touch upon other
22 things that would have to do with jury service and I notice --
23 are all the kids, all four of them, at home?

24 A. Yes, they are.

25 Q. Now, if you are selected as a juror and if you

1 have to spend your nights away from home, have you made
2 provision, or can you make provision, for the children to be
3 properly cared for?

4 A. Yes, I can.

5 Q. You feel in your mind that you would have the --
6 that you would have the time, then, to devote to the trial and
7 not be distracted by worrying about the kids or Mr. Wilde?

8 A. Bob is in the hospital right now, he had a back
9 injury last Wednesday and I consulted with the doctors and
10 said if he got worse they would send him to Boise, either
11 today or tomorrow. But, he is better, so they're probably
12 going to discharge him from the hospital Friday or Saturday.
13 So, there's --

14 Q. He's there at McCall, staying there, is that
15 right?

16 A. Yes, he is.

17 Q. Um-hmm. You think that's going to be unsettling,
18 that aspect of it, Mrs. Wilde?

19 A. No.

20 Q. Have you ever given any consideration to the death
21 penalty in criminal cases, Mrs. Wilde?

22 A. I've thought about it seriously and it's kind of
23 hard to really -- you would have to put all your time and
24 effort into a trial, I feel, and, if no doubts are in your
25 own mind because that is a big step to take.

1 Q Do you have a fixed opinion in opposition to the
2 death penalty?

3 A No, I don't.

4 Q Do you think that this being a capital case that
5 that would interfere, or influence you any in arriving at
6 your decision based on the evidence?

7 A No.

8 Q Mrs. Wilde, in a criminal trial I'm sure the
9 Judge is going to -- in this trial the Judge will instruct you
10 that the penalty is not the province or the concern or
11 function of the jury and that your duty as a juror will be to
12 determine the facts.

13 In other words, you are going to -- you are going
14 to consider the evidence and arrive at a decision as to guilt
15 or innocence.

16 Now, do you think you can separate penalty from
17 guilt or innocence?

18 A It's hard because I naturally think that if
19 someone is going -- was going to happen to them, you can't --
20 it would be hard to block it out of your mind. But, if I was
21 picked as a juror I would give all my attention to the trial
22 and I think that I could separate it.

23 Q All we're looking for is 12 people who will be
24 fair and arrive at a fair and equitable decision in this matter.

25 I'm sure the Judge will advise you that there's a

1 presumption of innocence on the part of the defendant until
2 proven guilty beyond a reasonable doubt.

3 Now, if in your mind at the conclusion of the
4 evidence the State has met that obligation and proved guilt
5 beyond a reasonable doubt, will the death penalty keep you from
6 rendering a final decision of guilt in this matter?

7 A. No, it will not.

8 MR. REMAKLUS: Fine. We'll pass the juror for cause,
9 Your Honor.

10
11 FURTHER VOIR DIRE EXAMINATION

12 BY MR. HOWER:

13 Q Mrs. Wilde, does your husband have any pretty
14 strongly held opinions about what ought to be done with
15 Mr. Creech?

16 A. No.

17 Q He does not?

18 Did you grow up in the McCall area?

19 A. Yes, I did.

20 Q Did you graduate from McCall High School?

21 A. Yes, I did.

22 Q What year?

23 A. 1971.

24 Q I don't remember whether Mr. Remaklus asked you
25 or not, but do you subscribe, in your home, to the Idaho

1 Statesman?

2 A. Yes, we do.

3 Q. What other newspapers or publications do you
4 subscribe to?

5 A. No others.

6 Q. It's not the Star News?

7 A. The Star, just the Star.

8 Q. The Star News? But not any other newspapers or
9 publications?

10 A. No.

11 Q. No other magazine?

12 A. No.

13 Q. Are there any other magazines that you or your
14 husband buys regularly?

15 A. No.

16 Q. Is there anything, Mrs. Wilde, about the prospect
17 of sitting as a juror in this cause that troubles you in your
18 conscience that we haven't asked you about? Do you have any
19 problems with it that you can't cope with?

20 A. No.

21 MR. HOWER: Pass for cause, Your Honor.

22 MR. REMAKLUS: Your Honor, I forgot to point out that
23 Mr. and Mrs. Wilde in the past have been clients of my office
24 and there's nothing going on. I'm not representing them at
25 the present time. I think that's been, what, a year or two

1 ago; has it not?

2 THE WITNESS: Yes, it has been.

3 THE COURT: Want to ask some more questions, Mr. Hower?

4 MR. HOWER: Mrs. Wilde, I don't have any problems with
5 this. I guess I'll ask you to say there's nothing in your
6 professional relationship, or your husband's with
7 Mr. Remaklus that would interfere with your conscience and
8 your judgment in deciding this case.

9 THE WITNESS: None.

10 MR. REMAKLUS: I can't imagine that it would.

11 MR. HOWER: No further questions, Your Honor.

12 THE COURT: Mrs. Wilde, we'll ask you to go back and
13 wait in the American Legion Hall and ask you to please not to
14 discuss the questions that have been asked you or anything
15 with the other jurors.

16 THE WITNESS: Okay.

17 THE CLERK: Ina Heinrich.

18

19

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21

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25